TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1943~~ 44

No. ~~741~~ 33

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

vs.

C. C. HARMON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1944
CERTIORARI GRANTED APRIL 3, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 741.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

~~C. C. HARMON~~

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

A [Caption omitted.]

1 In the United States Circuit Court of Appeals for the Tenth Circuit

No. 2744

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

C. C. HARMON, RESPONDENT

Petitioner's designation of printed record

Filed May 13, 1943

In Commissioner versus Harmon, number two seven four four the appellant designates for inclusion in the printed record all material in Transcript of Record. For a statement of points to be relied upon the appellant adopts the statement of points contained in the Transcript of Record and previously served on appellee. Copy of this wire has been mailed counsel for appellee.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

[File endorsement omitted.]

2 In the Tax Court of the United States

C. C. HARMON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 108657

Appearances—For Taxpayer: Hilary D. Mahin, Esq., L. Karleton Mosteller, Esq., Harry A. Campbell, Esq., Roger S. Dandolph, Esq. For Com'r.: E. G. Sievers, Esq., L. R. Vanberg, Esq.

Docket entries

1941

Sept. 13—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 15—Copy of petition served on General Counsel.

Oct. 24—Amended petition filed by taxpayer. 10/24/41 copy served.

Dec. 23—Answer to amended petition filed by General Counsel.

Dec. 30—Notice issued placing proceeding on Tulsa, Okla., calendar. Copy served.

1942

Feb. 3—Hearing set March 23, 1942 at Tulsa, Okla.

Mar. 30—Hearing had before Mr. Smith. Submitted. Stipula-
-31 tion of facts (2) filed. Briefs due May 26, 1942—replies 6/15/42.

Apr. 13—Transcript of hearing of March 30 and 31, 1942, filed.

May 26—Brief filed by taxpayer.

May 27—Motion for extension of time to July 1, 1942 to file brief, filed by General Counsel. 5/28/42 granted.

June 27—Brief filed by General Counsel. 8/25/42 printed copies rec'd.

June 29—Copy of brief served on General Counsel.

3 July 8—Motion for extension to July 25, 1942, to file reply brief, filed by taxpayer. 7/8/42 granted as to both parties.

July 25—Reply brief filed by General Counsel. 8/25/42 printed copies rec'd.

Aug. 13—Agreed motion to clarify stipulation of facts filed. 8/19/42 granted.

Aug. 13—Agreed motion to correct transcript filed. 8/19/42 granted.

Aug. 13—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 8/19/42 granted and served.

Sept. 14—Motion for leave to file the attached printed reply brief, filed by taxpayer. 9/16/42 granted.

Sept. 16—Reply brief filed by taxpayer.

Sept. 17—Copy of motion and reply brief served on General Counsel.

Nov. 18—Findings of fact and opinion rendered, Smith, J. #5. Decision will be entered under Rule 50. 11/24/42 copy served.

1943

Jan. 22—Agreed computation of deficiency filed.

Jan. 26—Decision entered, Charles P. Smith, J. #5.

Apr. 9—Petition for review by U. S. Circuit Court of Appeals, 10th Cir., filed by General Counsel.

Apr. 9—Notice of filing petition for review sent to Harry A. Campbell, filed.

Apr. 13—Statement of points to be relied upon filed by General Counsel.

Apr. 13—Designation of portions of record to be contained in record filed by General Counsel.

1943

Apr. 16—Proof of service of filing petition for review (Harry A. Campbell) filed.

Apr. 20—Proof of service of filing petition for review (C. C. Harmon) filed.

Apr. 23—Proof of service of filing designation of contents of record filed by General Counsel. (Harry A. Campbell.)

4 Apr. 26—Counter designation of portions of record to be contained in record filed by taxpayer with proof of service thereon. Agreed to.

Apr. 26—Notice of filing designation of portions of record filed by taxpayer with proof of service thereon.

[In the Tax Court of the United States]

Petition

Filed Sept. 13, 1941

The above-named petitioner hereby petitions for a redetermination of the deficiency in income tax set forth by the Commissioner of Internal Revenue in his notice of deficiency dated July 29, 1941, and as a basis of his proceeding alleges as follows:

JURISDICTION OF BOARD

1. The petitioner is an individual with residence and office at Nowata, Oklahoma. The income tax return for the calendar year 1939, the period here involved, was filed with the Collector of Internal Revenue for the Oklahoma District.

2. The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to the petitioner on July 29, 1941, and was received by him shortly thereafter.

Amount of Deficiency

3. The respondent has determined and proposed a deficiency in income tax for the calendar year 1939 in the amount of $11,029.95. The amount of such deficiency in controversy in this proceeding is approximately $9,300.00.

ASSIGNMENTS OF ERROR

4. The determination of income tax set forth in said notice of deficiency is based upon the following errors:

4 (a). The respondent erred in adding to petitioner's income $1,666.67, representing one-half of the salary paid to petitioner

on and after November 1, 1939, by Harmon & Whitehill, Inc., an Oklahoma corporation.

4 (b). The respondent erred in adding to petitioner's income $5,125.25 and in deducting from petitioner's income $4,928.00, resulting in a net addition to petitioner's income of $197.25.
5 The item of $5,125.25 represents one-half of all dividends received on and after November 1, 1939, from corporate stocks owned by petitioner, and $4,928.00 represents one-half of all dividends received on and after November 1, 1939, from corporate stocks owned by petitioner's wife.

4 (c). The respondent erred in adding to petitioner's income $236.25, representing one-half of all interest received by petitioner on and after November 1, 1939.

4 (d). The respondent erred in adding to petitioner's income $607.33, representing one-half of petitioner's distributive share of the ordinary net income on and after November 1, 1939, of two partnerships in which petitioner was a member.

4 (e). The respondent erred in adding to petitioner's income $1,387.18 and in deducting from petitioner's income $954.82, resulting in a net addition to petitioner's income of $432.36. The item of $1,387.13 represents one-half of the net income on and after November 1, 1939, from all oil and gas royalties owned by petitioner, and $954.82 represents one-half of the net income on and after November 1, 1939, from all oil and gas royalties owned by petitioner's wife.

4 (f) (1). The respondent erred in adding to petitioner's income $4,861.29 and in deducting from petitioner's income $61.35, resulting in a net addition to petitioner's income of $4,799.94. The item of $4,861.29 represents one-half of the net income on and after November 1, 1939, from all oil and gas leases owned by petitioner, and $61.35 represents one-half of the net income on and after November 1, 1939, from all oil and gas leases owned by petitioner's wife.

4 (f) (2). The respondent erred in adding to petitioner's income that portion of the $4,865.60 of miscellaneous adjustments of leasehold depreciation and expense which, under the Oklahoma Community Property Act, should have been added to the income of petitioner's wife.

4 (g) (1). The respondent erred in adding to petitioner's income $7,036.50, representing all of petitioner's cost in certain oil and gas royalties which became worthless prior to Novem-
6 ber 1, 1939, and one-half of petitioner's cost in certain oil and gas royalties which became worthless on or after November 1, 1939.

4 (g) (2). As an alternative assignment of error to (g) (1) above, if the Oklahoma Community Property Act does not permit

division between husband and wife of royalty losses or if the Act is inoperative for Federal income tax purposes, the respondent erred in failing to allow as a deduction from petitioner's income the sum of $8,349.00, representing all of petitioner's cost in all of his oil and gas royalties which became worthless and were charged off during the calendar year 1939.

4 (h). The respondent erred in disallowing as a deduction $98.59 and in allowing as a deduction $53.14, resulting in a net addition to petitioner's income of $45.45. The item of $98.59 represents one-half of certain taxes paid by petitioner's wife on and after November 1, 1939, and $53.14 represents one-half of certain taxes paid by petitioner on and after November 1, 1939.

4 (i). The respondent erred in allowing as a deduction $15.00, representing one-half of all contributions paid by petitioner on and after November 1, 1939.

4 (j). The respondent erred in allowing as a deduction $87.68, representing one-half of expense of petitioner's field car on and after November 1, 1939.

4 (k). The respondent erred in allowing as a deduction $288.37, representing one-half of office expense of petitioner on and after November 1, 1939.

4 (l). The respondent erred in allowing as a deduction $4.66, representing one-half of depreciation sustained on and after November 1, 1939, upon office fixtures owned by petitioner.

4 (m). The respondent erred in allowing as a deduction $90.38, representing one-half of traveling expenses paid by petitioner on and after November 1, 1939.

4 (n). The respondent erred in allowing as a deduction $88.83, representing one-half of depreciation sustained on and after November 1, 1939, upon business cars owned by petitioner.

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FACTS

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

Facts Relating Generally to the Assignments of Error

Petitioner's books and records during the calendar year 1939 were kept on the cash basis, and his income tax return for that year was filed on this basis.

On October 26, 1939, there was filed in the office of the County Clerk of Nowata County, Oklahoma, a written election, signed by the petitioner and his wife, stating that they desired to avail themselves of the provisions of the Oklahoma Community Property Act, and have this Act apply to them and to their property. On October 27, 1939, there was filed in the office of the Secretary of

State of the State of Oklahoma a duplicate original of this written election. Each of these duplicate elections was duly acknowledged in the form prescribed by Oklahoma law for acknowledgments to conveyances of real estate.

These elections, by reason of the provisions of Section One of the Oklahoma Community Property Act, caused this Act to apply to petitioner and his wife and to their property and to the income and expense applicable to them and to their property on and after November 1, 1939.

5 (a). Facts Particularly Relating to Assignment of Error 4 (a)

During the calendar year 1939, petitioner was the president of Harmon and Whitehall, Inc., an Oklahoma corporation. His salary as president for this year was $20,000.00, of which $3,333.34 was received by petitioner on and after November 1, 1939. Petitioner on his 1939 income tax return reported as salary from this corporation $18,333.33, and petitioner's wife reported on her income tax return for the calendar year 1939 as salary $1,666.67. Respondent has added to petitioner's income the $1,666.67 of salary reported by petitioner's wife in her return.

8 5 (b). Facts Particularly Relating to Assignment of Error 4 (b)

Petitioner on and after November 1, 1939, received in dividends upon the following corporate stocks owned by him the following amounts: Atlantic Refining Company, $50.00; Consolidated Oil Corporation, $80.00; Phillips Petroleum Company, $140.50; Standard Oil Company of Indiana, $100.00; Pure Oil Company, $50.00; Louisiana Land and Exploration Company, $50.00; Harmon & Whitehill, Inc., $9,780.00. These dividends totaled $10,250.50. Petitioner's wife on her 1939 income tax return reported one-half of thes dividends, or $5,125.25.

Petitioner's wife on and after November 1, 1939, received the following dividends upon corporate stocks owned by her: Consolidated Oil Corporation, $56.00; Standard Oil Company of Indiana, $100.00; Harmon & Whitehill, Inc., $9,700.00. These dividends totaled $9,856.00. Petitioner on his 1939 income tax return reported one-half of these dividends, or $4,928.00.

Respondent has added to petitioner's income the $5,125.25 of dividends upon petitioner's stocks reported by his wife on her return, and has deducted from petitioner's income the $4,928.00 of dividends upon stocks owned by petitioner's wife which were reported by petitioner on his return. These adjustments by respondent result in a net addition to petitioner's income of $197.25.

5 (c). Facts Particularly Relating to Assignment of Error 4 (c)

Petitioner on and after November 1, 1939, received as interest upon indebtedness owed to him the following amounts from the following debtors: First National Bank and Trust Company, $460.00; H. A. Hobson, $12.50. These amounts totaled $472.50. Petitioner's wife reported on her 1939 income tax return one-half of this total, or $236.25.

Respondent has added to petitioner's income the $236.25 of interest reported by petitioner's wife on her return.

5 (d). Facts Particularly Relating to Assignment of Error 4 (d)

Petitioner during the calendar year 1939 was a member of two partnerships, Atlas Oil Company and Cowdery & Harmon. The distributive share of petitioner of the ordinary net income of each of these partnerships on and after November 1, 1939, was as follows: Atlas Oil Company, $425.42; Cowdery & Harmon, $789.24. These distributive shares totaled $1,214.66. Petitioner's wife on her 1939 income tax return reported one-half of this total, or $607.33.

Respondent has added to petitioner's income for the calendar year 1939, $607.33, representing the portion of petitioner's distributive share of net income of these partnerships reported by his wife.

5 (e). Facts Particularly Relating to Assignment of Error 4 (e)

Petitioner on and after November 1, 1939, received from oil and gas royalties owned by him net taxable income of $2,774.36. Petitioner's wife on her 1939 income tax return reported one-half of this net income from royalties, or $1,387.18.

Petitioner's wife on and after November 1, 1939, received from oil and gas royalties owned by her net taxable income of $1,909.65. Petitioner on his 1939 income tax return reported one-half of this net income from royalties, or $954.82.

Respondent has added to petitioner's income the $1,387.18 of income from petitioner's royalties reported by his wife on her return and has deducted from petitioner's income the $954.82 of income upon royalties owned by petitioner's wife which was reported by petitioner on his return. These adjustments by respondent result in a net addition to petitioner's income of $432.36.

5 (f). Facts Particularly Relating to Assignment of Error 4 (f) (1) and 4 (f) (2)

Respondent has added to Petitioner's income from his oil and gas leases a total of $9,665.54. Of this amount, $4,865.60 arises
10 from numerous adjustments of expense and depreciation items upon these leases. Petitioner concedes the principle upon which these adjustments were made, but does not concede that there should be added to his income that portion of the $4,865.60 which under the Oklahoma Community Property Act should have been added to the income of his wife. The balance of respondent's proposed addition to income, of $4,799.94, is in controversy in its entirety and arises under the following facts.

Petitioner on and after November 1, 1939, received from oil and gas leases owned by him net taxable income of $9,722.58. Petitioner's wife on her 1939 income tax return reported one-half of this income, or $4,861.29.

Petitioner's wife on and after November 1, 1939, received from oil and gas leases owned by her net taxable income of $122.70. Petitioner on his 1939 income tax return reported one-half of this income, or $61.35.

Respondent has added to petitioner's income the $4,861.29 of net income upon petitioner's oil and gas leases reported by his wife on her return and has deducted from petitioner's income the $61.35 of income upon oil and gas leases owned by petitioner's wife which were reported by petitioner on his return. These adjustments by respondent result in a net addition to petitioner's income of $4,799.94.

5 (g). Facts Particularly Relating to Assignment of Error 4 (g) (1) and 4 (g) (2)

Petitioner on June 24, 1939, acquired at a cost of $750.00 an undivided 1/8 interest in the oil and gas rights under the northeast quarter of the northeast quarter of Section 17, Township 5 North, Range 10 East, Hughes County, Oklahoma. On July 23, 1939, a dry hole was completed on this property to a total depth of 4,612 feet. This hole was plugged and abandoned on July 24, 1939.

Petitioner on January 7, 1938, acquired for $1,575.00 a 1/32 interest in the oil and gas rights under the south half of the southeast quarter of Section 12, Township 18 North, Range 1 East, Payne County, Oklahoma. Prior to November 1, 1939, there was
11 completed as a direct off-set to this property a well which produced only water. This well was drilled to the Wilcox sand feet at 4,882 feet. Because of this well the lessee of the prop-

erty in which petitioner has this royalty interest has not drilled on this property and has released the lease thereon.

Petitioner on January 7, 1938, acquired for $1,824.00 a 1/32 interest in the oil and gas rights under the north half of the northeast quarter of Section 18, Township 18 North, Range 2 East, Payne County, Oklahoma. A dry hole to a total depth of 4,932 feet was drilled on this property and the hole was abandoned on May 28, 1939.

On January 8, 1938, petitioner acquired for $1,575.00 a 1/32 interest of the oil and gas rights under the south half of the southeast quarter of Section 18, Township 18 North, Range 2 East, Payne County, Oklahoma. A dry hole was drilled upon this property to the Wilcox sand to a total depth of 4,973 feet and was abandoned on May 23, 1939.

The aggregate cost in the aforesaid four royalty interests is $5,724.00. Each of these royalties was condemned by exploratory drilling prior to November 1, 1939.

On August 30, 1938, petitioner acquired for a total cost of $2,625.00 three royalty interests located in Sections 17, 19, and 20, Township 18 North, Range 3 East, Fayette County, Illinois. Exploratory drilling near each of these royalty interests caused the lessee of these interests to decide not to drill any wells on any of these three interests. The west edge of an adjacent oil field has been defined clearly as being approximately one mile east of each of these royalty interests. This exploratory drilling and definition of the edge of the field established that each of these royalty interests became worthless or or after November 1, 1939.

Petitioner on his 1939 income tax return claimed as a deduction $7,036.50, representing all of his costs in the four oil and gas royalties which became worthless prior to November 1, 1939, and one-half of his costs in the three royalty interests which became worthless on or after November 1, 1939. Petitioner's wife in her
12 1939 income tax return claimed as a deduction $1,312.50 representing one-half of the costs of the three royalty interests which became worthless on or after November 1, 1939.

Respondent has disallowed as a deduction the $7,036.50 claimed by petitioner in his 1939 income tax return.

5 (h). Facts Particularly Relating to Assignment of Error 4 (h)

Petitioner on and after November 1, 1939, paid certain taxes in the total amount of $106.28. Petitioner's wife on her 1939 income tax return deducted one-half of these taxes, or, $53.14.

Petitioner's wife on and after November 1, 1939, paid certain taxes in the total amount of $197.18. Petitioner on his 1939 income tax return deducted one-half of these taxes, or $98.59.

Respondent has allowed as a deduction from petitioner's income the $53.14 of taxes deducted by his wife on her return and has disallowed as a deduction from petitioner's income the $98.59 of taxes claimed by petitioner on his return. These adjustments by respondent result in a net addition to petitioner's income of $45.45.

5 (i). Facts Particularly Relating to Assignment of Error 4 (i)

Petitioner on and after November 1, 1939, paid $30.00 in charitable contributions. Petitioner's wife on her 1939 income tax return deducted one-half of these contributions, or $15.00.

Respondent has allowed as an additional deduction to petitioner the $15.00 of contributions reported by petitioner's wife on her return.

5 (j). Facts Particularly Relating to Assignment of Error 4 (j)

Petitioner on and after November 1, 1939, paid as expense for a field car $175.36. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $87.68.

13 Respondent has allowed as an additional deduction from petitioner's income the $87.68 of field car expense deducted by petitioner's wife on her return.

5 (k). Facts Particularly Relating to Assignment of Error 4 (k)

Petitioner on and after November 1, 1939, paid office expenses totaling $576.74. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $288.37.

Respondent has allowed as an additional deduction to petitioner the $288.37 of office expenses reported by petitioner's wife on her return.

5 (l). Facts Particularly Relating to Assignment of Error 4 (l)

Petitioner on and after November 1, 1939, sustained depreciation of $9.32 upon office furniture and fixtures owned by him. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $4.66.

Respondent has allowed as an additional deduction to petitioner the $4.66 of depreciation claimed as a deduction by petitioner's wife on her return.

5 (m). Facts Particularly Relating to Assignment of Error 4 (m)

Petitioner on and after November 1, 1939, paid in traveling expenses $180.76. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $90.38.

Respondent has allowed as an additional deduction to petitioner the $90.38 of traveling expenses claimed as a deduction by petitioner's wife on her return.

5 (n). Facts Particularly Relating to Assignment of Error 4 (n)

Petitioner on and after November 1, 1939, sustained depreciation in the amount of $177.66 upon business automobiles owned by him. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $88.83.

14 Respondent has allowed as an additional deduction to petitioner the $88.83 of depreciation claimed as a deduction by petitioner's wife on her return.

PRAYER

6. Wherefore, petitioner prays that this Honorable Board may hear this proceeding and find and determine:

6 (a). That the effective date of the election of petitioner and his wife to come within the provisions of the Oklahoma Community Property Act was November 1, 1939.

6 (b). That the Oklahoma Community Property Act is a valid rule of property law applicable to petitioner and his wife and to their property and to the income and expense applicable to them and to their property from and after November 1, 1939.

6 (c). That the Oklahoma Community Property Act is binding upon respondent and petitioner in the computation of petitioner's net taxable income for the calendar year 1939.

6 (d). That petitioner in computing his net taxable income for the calendar year 1939 properly included one-half of the income and deductions attributable to the property owned by and to the activities of his wife for the period from and after November 1, 1939, and that he properly excluded one-half of the income and deductions attributable to the property owned by him and to his activities for the period from and after November 1, 1939.

6 (e). That respondent erred in adding to petitioner's net taxable income the items of income and deduction attributable to the property owned by and to the activities of petitioner which were included in the separate return of petitioner's wife, and in excluding from such taxable income the items of income and deduction

attributable to the property owned by and to the activities of petitioner's wife which were included in the return of petitioner.

6 (f). That the deficiency in income tax determined by respondent for the calendar year 1939 in his notice of deficiency be disallowed to the extent of approximately $9,300.00, and that the deficiency be recomputed under Rule 50.

6 (g). That, alternatively, a deduction of $8,349.00 because of worthless oil and gas royalties be allowed to petitioner in computing his net taxable income for the calendar year 1939 in the event this Honorable Board should find and determine that the Oklahoma Community Property Act is inapplicable for Federal income tax purposes, and;

6 (h). That petitioner be granted such other and further relief as may to this Honorable Board seem just and proper.

Respectfully submitted.

HARRY A. CAMPBELL,
Philtower Building, Tulsa, Oklahoma.
HILARY D. MAHIN,
Philtower Building, Tulsa, Oklahoma.
ROGER S. RANDOLPH,
Philtower Building, Tulsa, Oklahoma.
L. KARLETON MOSTELLER,
First National Bank Building,
Oklahoma City, Oklahoma.
Counsel for Petitioner.

[Duly verified.]

Exhibit A to petition

Form 1230. SN–IT–1
Seal. Oklahoma Collection District

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE.
Oklahoma City, Oklahoma, July 29, 1941.

Office of Internal Revenue Agent in charge ________ Oklahoma ____ Division.

MR. C. C. HARMON,
Nowata, Oklahoma.

Registered Mail

SIR: You are advised that the determination of your income tax liability for the taxable year(s) ended Dec. 31, 1939, discloses a deficiency of $11,029.95, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

16 Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, 303 Federal Building, Oklahoma City, Oklahoma. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,
By W. A. HOLT,
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.

JDC: d GPO 2-17679

Statement

MR. C. C. HARMON, NOWATA, OKLAHOMA

Tax Liability for the Taxable Year
Ended December 31, 1939

	Liability	Assessed	Deficiency
Income tax	$34,016.05	$22,986.10	$11,029.95

In making this determination of your income tax liability, careful consideration has been given to report of examination dated April 22, 1941.

A copy of this letter and statement has been mailed to your representative, Harry A. Campbell, 304 Philtower

17 Building, Tulsa, Oklahoma, in accordance with the authority contained in the power of attorney executed by you.

Schedule 1

Adjustments to Net Income

Net income as disclosed by return		$83,303.82
Additions to income:		
(a) Salary adjusted	$1,666.67	
(b) Dividends	197.25	
(c) Interest received adjusted	236.25	
(d) Income from partnerships adjusted	607.33	
(e) Income from royalties adjusted	432.32	
(f) Income from oil and gas leases adjusted	9,665.54	
(g) Royalties claimed to be condemned	7,036.50	
(h) Taxes paid adjusted	45.45	19,887.31
		103,191.13
(i) Contributions adjusted	15.00	
(j) Field car expense adjusted	87.68	
(k) Office expense adjusted	288.37	
(l) Depreciation on furniture and fixtures	4.66	
(m) Traveling expense	90.38	
(n) Depreciation on cars	88.83	574.92
Net income as adjusted		102,616.21

Schedule 1–A

Explanation of Adjustments

NOTE.—Under items 6 and 7, page 1, of your return, you reported income totaling $83,367.21, detail computation of which is
18 shown in schedules attached to the return. The totals of the various items of income and expenses, as shown in these schedules, have been adjusted as is shown below. In this statement the amount claimed in your return has been arrived at by adding the totals of each of the various items shown in the above-mentioned schedules, and deducting therefrom the portion of these various items of income and expense included in your wife's return.

These adjustments result in the addition to taxable net income of $11,746.10, which was income taxable only to you, but reported in the return of your wife, Mrs. Pearl M. Harmon, less $6,042.90 of net income of your wife which was reported in your return. In addition to the above-mentioned adjustments certain other adjustments are made in following computations:

(a) This represents adjustment of salary earned by you and paid to you by Harmon & Whitehill, Inc., Nowata, Oklahoma, for services rendered solely by you, of which your wife, Mrs. Pearl M. Harmon, reported $1,666.67. Adjustment is as follows:

2

From whom received	Salary earned by you	Amount of such salary reported in your return	Amount of such salary reported in your wife's return
Harmon & Whitehill, Inc	$20,000.00	$18,333.33	$1,666.67

This salary of $1,666.67 reported by your wife is taxable to you.

(b) This represents adjustment of certain dividends received on the corporate stocks listed below which were in part reported in your return and in part reported in your wife's return.

(1) Dividends of $5,125.25 on corporate stocks owned solely by you, and reported in your wife's return:

Name of corporation	Dividends received by you	Amount of such dividends reported in your return	Amount of such dividends reported in your wife's return
Atlantic Refining Co	$200.00	$175.00	$25.00
Consolidated Oil Corp	320.00	280.00	40.00
Phillips Petroleum Co	462.05	391.80	70.25
Standard Oil Co. of Indiana	200.00	150.00	50.00
Pure Oil Co	50.00	25.00	25.00
Louisiana Land & Exp. Co	50.00	25.00	25.00
Harmon & Whitehill, Inc	9,780.00	4,890.00	4,890.00
Total	11,062.05	5,936.80	5,125.25

The above-mentioned dividends of $5,125.25 reported by your wife in her return are taxable solely to you.

(2) Dividends of $4,928.00 on corporate stocks owned solely by your wife which were reported in your return.

Name of corporation	Dividends received by your wife, a portion of which were reported in your return	Amount of such dividends reported in your return	Amount of such dividends reported in your wife's return
Consolidated Oil Corp	$224.00	$28.00	$196.00
Standard Oil Co. of Indiana	250.00	50.00	200.00
Harmon & Whitehill, Inc	9,700.00	4,850.00	4,850.00
Totals	10,174.00	4,928.00	5,246.00

The above-mentioned dividends of $4,928.00 reported by you in your return are taxable solely to your wife.

The two above mentioned adjustments of $5,125.25 less $4,928.00 result in a net adjustment of $197.25.

(c) This represents adjustment of interest received by you on indebtedness owed solely to you by the obligators listed below, of which your wife reported $236.25 in her return.

20 Name of obligators	Interest received	Amount of such interest reported in your return	Amount of such interest reported in your wife's return
H. J. Whitehill	$125.00	$125.00	
First Nat'l Bk. on time deposit	460.00	230.00	$230.00
H. A. Hobson	12.50	6.25	6.25
Totals	597.50	361.25	236.25

The above-mentioned interest of $236.25 reported in your wife's return is taxable to you.

(d) This represents adjustment of your share of income from the following partnerships, of which you, and not your wife, were a member.

Partnership	Your share of partnership income	Partnership income reported in your return	Partnership income reported in your wife's return
Atlas Oil Co	$2,552.52	$2,339.81	$212.71
Cowdery & Harmon	4,765.20	4,370.58	394.62
Totals	7,317.72	6,710.39	607.33

Above-mentioned partnership income of $607.33 is taxable solely to you.

(e) This represents adjustment of your income from royalties. Your income from this source has been adjusted by the allowance of an additional deduction of 4¢ for depletion, by the inclusion of net royalty income from royalty interests owned solely by you but reported in your wife's return, and by the elimination of the income from royalties owned solely by your wife, which was reported in your return. Adjustment is as follows:

Net income from royalties as reported in your return		$12,181.09
Add income reported in your wife's return from royalties listed in Schedule C of your return, which royalty interests were owned solely by you		1,387.18
Total		13,568.27
21 Less income reported in your return from royalty interests owned solely by your wife (being ½ of $1,909.65 as shown in Schedule C of your return)		954.82
Balance		12,613.45
Less understatement of depletion on royalties as follows:		
Amount of depletion allowable thereon	$5,871.47	
Amount claimed in your return	5,871.43	.04
Net income from royalties as adjusted		12,613.41
Amount reported in your return		12,181.09
Net adjustment		432.32

(f) This represents adjustment of your income from oil and gas leases. Your income from this source has been adjusted by the inclusion of net income from producing leases owned solely by you, but which income was reported in your wife's return, by the elimination of income from lease interests owned solely by you which was reported in your return, and adjustment as shown in Exhibit A hereof. Adjustment is as follows:

Net income from lease interests owned by your wife but reported in your return	$61.35	
Net income from oil and gas leases as reported in Schedule A of your return	41,361.72	
Net income from oil and gas leases as reported from Schedule A of your return	9,722.58	
Total	51,145.65	
Less: Income from these leases which was reported in your wife's return	4,861.29	
22 Net income reported in your return from oil and gas leases		$46,284.36
Add: Net income from leases owned solely by you but reported in your wife's return, which income is taxable only to you	$4,861.29	
Net adjustment as is shown in Exhibit A hereof	4,865.60	
Total	9,726.89	
Less: Income from lease interests owned solely by your wife, but reported in your return, which income is taxable only to your wife	61.35	
Net adjustment of income from leases		9,665.54
Net income from this source as adjusted		55,949.90

(g) This represents adjustment of deduction claimed for condemned royalties. The royalty interests on which deduction was claimed were as follows:

Name of property	Description per return	Amount of loss claimed on return
Ham	S½SE¼ 12-18N-1E, Payne County, Okla	$1,575.00
Wilbanks	NE¼NE¼ 17-5N-10E, Hughes County, Okla.	750.00
Camilla Whitely	S½SE¼ 18-18N-2E, Payne Co., Okla	1,575.00
Ellis E. Johnson	N½NE 18-18N-2E, Payne Co., Oklahoma	1,824.00
Rogers	Sec. 17, 19, & 20, T. 8N, R. 3E, Fayette Co., Ill.	2,625.00
Total		8,349.00
Less amount deducted in your wife's return		1,312.50
Net amount deducted in your return		7,036.50

23 Deductions claimed for the above-mentioned royalties are not allowable, inasmuch as you have not submitted information proving that these royalties were condemned for oil and

gas during the taxable year ended December 31, 1939, and inasmuch as you retained your interest in these properties at the close of the year 1939.

(h) This represents adjustment for allowable taxes paid. During the taxable year in question you paid $1,754.19 of taxes which you owed. Of this amount $1,701.05 was deducted in your return and $53.14 was deducted in your wife's return. This item of $53.14 is deductible only by you.

In your return you also claimed a deduction of $98.59 for taxes which were owed and paid by your wife. These taxes are deductible only by your wife.

The two above-mentioned adjustments of $53.14 and $98.59 result in a net adjustment of $45.45.

(i) This represents adjustment for allowable contributions made by you during the taxable year ended December 31, 1939. The total of such contributions given and paid by you during the year in question was $305.00, of which amount your wife deducted in her return $15.00 and you deducted in your return $290.00. This item of $15.00 deducted in your wife's return is deductible only by you.

(j) This represents adjustment for field car expense. During the taxable year you paid $561.60 in the operation of a field car in connection with properties owned by you. Of the total of $561.60 your wife deducted on her return $87.68 and you deducted in your return $473.92. Inasmuch as this was an expense of yours, deduction of $87.68 in your wife's return is deductible only by you. It is noted that in listing expenses in your return, $175.36 of field car expense was omitted. However, same was properly included in the total as shown by your return.

24 (k) During the taxable year in question, your total office expense was $1,554.80, of which amount you deducted $1,266.43 in your return and your wife deducted $288.37 in her return. The deduction of $288.37 is deductible only by you.

(l) Deduction for depreciation on furniture ad fixtures was claimed under two separate items in your return. Deduction claimed under item 13, page 1, of your return, but marked depreciation on furniture and fixtures, amount $63.39, has been allowed as claimed. In addition thereto you claimed as a deduction in computing your income as shown under items 6 and 7, page 1, of your return $51.36, and your wife claimed in her return $4.66, making a total of $56.02. Inasmuch as this depreciation was on the furniture and fixtures owned solely by you, the deduction of $4.66 as claimed in your wife's return is deductible only by you.

(m) This represents adjustment for traveling expense. During the taxable year ended December 31, 1939, you spent $1,081.25 for

traveling expense, of which amount $990.87 was deducted in your return, and $90.38 was deducted in your wife's return. This item of $90.38 is deductible only by you, inasmuch as same was spent in connection with your business ventures.

(n) This represents adjustment for depreciation sustained on cars used in your business. The total deduction for depreciation on cars as shown in your return was $1,110.38, of which amount you deducted $1,021.55 in your return and your wife deducted $88.83 in her return. Inasmuch as these cars were used by you in connection with your business affairs, and not those of your wife, and as the cars were owned by you, the deduction of $88.83 claimed in your wife's return is deductible only by you.

25

Schedule 2

Computation of Tax

Net income as adjusted	$102,616.21
Less: Personal exemption	2,500.00
Balance (Surtax net income)	100,116.21
Less earned income credit (10% of $14,000)	1,400.00
Net income subject to normal tax	98,716.21
Normal tax at 4% on $98,716.21	3,948.65
Surtax on $100,116.21	30,067.40
Total correct income tax liability	34,016.05
Income Tax assessed: Original list, Account No. 201,319	22,986.10
Deficiency of income tax	11,029.95

Exhibit A

Summary of Certain Adjustments to Net Income From Oil and Gas Leases

Additions to Net Income:		
Brown Lease: Error in insurance deduction		$1.00
Campbell Lease: Error in general expense		.50
Howerton Lease: Adjustment of sales to Brown		150.00
Replacements chargeable against depreciation reserve which were included in expense in return:		
Brown:		
8/12/39—Nipples and tubing	$70.54	
12/13/39—Line pipe and sucker rods	128.19	
Total	198.73	
Your 1/3 of 7/8		57.96
Fister: 12/13/39—$6\frac{5}{8}$" casing, etc		219.83
Campbell: 4/13/39—1-20 H. P. Cyl.	$152.68	
Your $\frac{1}{2}$ interest therein		76.34

26 The following capital expenditures were included in expense in your return.

D. & E. Robbins Lease:		
Cost of lease house	$1,036. 79	
Pump, steel, etc	110. 29	
Total	1,147. 08	
Your ¾ interest therein		$860. 31
Robbins & Webber Lease:		
Abstract	$5. 75	
Pump, steel, etc	110. 29	
Total	116. 04	
Your ¾ interest therein		87. 03
Replacements included in expense in return:		
Howerton-Johnson Lease:		
3-13-39 tubing, etc	$74. 46	
8/12/39 tubing, etc	91. 96	
12/13/39 line pipe, etc	42. 35	
Total	208. 77	
Your ½ interest therein		104. 38
Forwarded	$1,557. 35	
Excessive depreciation as shown by Exhibit B hereof	4,756. 81	
Total	6,314. 16	
Less error in computation of sales tax deducted		.05
Additional depletion allowable as shown by Exhibit C hereof		1,448. 46
Error in computation on return		.05
Total	$6,314. 16	1,448. 56
Net adjustment	4,865. 60	

27 *Exhibit B*

Depreciation—Lease Equipment

	Claimed	Allowable	Decrease
Cates	$83. 35	None	$83. [illegible]
Cates B	195. 75	None	195. 75
Conner	156. 52	None	156. 52
Fister	295. 78	None	295. 78
Howerton	655. 81	$290. 24	365. 57
Brown	31. 31	None	31. 31
D. & E. Robbins	5,643. 31	3,528. 88	2,114. 43
Robbins & Weber	11,747. 80	10,622. 45	1,125. 35
Robbins & Marshall	632. 01	511. 81	120. 20
Canada	398. 00	188. 48	209. 52
Taylor & White	428. 89	369. 86	59. 03
	20,268. 53	15,511. 72	4,756. 81

No deduction has been allowed for depreciation on the Cates, Cates B, Conner, Fister, and Brown properties, inasmuch as depreciation has been previously allowed in an amount equal to the cost of depreciable equipment less salvage.

28 *Exhibit C*

Depletion Claimed and Allowable—Leases

Lease	Claimed	Allowable	Increase (decrease)
Everett	$812.07	$812.08	$0.01
Love	329.53	329.54	.02
Newcomb	353.19	362.40	9.21
Cates	1,458.35	1,611.92	153.57
Connor	535.33	619.46	84.13
Campbell	273.19	74.20	(198.99)
Fister	122.46	187.78	65.32
Howerton	2,273.92	2,273.90	(.02)
Brown	1,405.10	1,405.10	
D. & E. Robbins	7,354.50	8,882.65	1,528.15
Robbins & Webber	24,936.17	24,936.18	.01
Robbins & Marshall	802.92	802.92	
Canada	476.23	283.29	(192.94)
Taylor & White	857.71	857.71	
Coker-Byfield	2,447.05	2,447.05	
Totals	44,437.72	45,886.18	1,448.46

Amended petition

Filed Oct. 24, 1941

The above-named petitioner hereby amends his original petition for a redetermination of the deficiency in income tax set forth by the Commissioner of Internal Revenue in his notice of deficiency dated July 29, 1941, and as a basis for this proceeding alleges as follows:

JURISDICTION OF BOARD

1. The petitioner is an individual with residence and office at Nowata, Oklahoma. The income tax return for the calendar year 1939, the period here involved, was filed with the Collector of Internal Revenue for the Oklahoma District.

2. The notice of deficiency, a copy of which is attached and marked "Exhibit A," was mailed to the petitioner on July 29, 1941, and was received by him shortly thereafter.

29 AMOUNT OF DEFICIENCY

3. The respondent has determined and proposed a deficiency in income tax for the calendar year 1939 in the amount of $11,029.95. The amount of such deficiency in controversy in this proceeding is approximately $9,300.00.

ASSIGNMENTS OF ERROR

4. The determination of income tax set forth in said notice of deficiency is based upon the following errors:

4 (a). The respondent erred in adding to petitioner's income $1,666.67, representing one-half of the salary paid to petitioner

on and after November 1, 1939, by Harmon & Whitehall, Inc., an Oklahoma corporation.

4. (b). The respondent erred in adding to petitioner's income $5,125.25 and in deducting from petitioner's income $4,928.00, resulting in a net addition to petitioner's income of $197.25. The item of $5,125.25 represents one-half of all dividends received on and after November 1, 1939, from corporate stocks owned by petitioner, and $4,928.00 represents one-half of all dividends received on and after November 1, 1939, from corporate stocks owned by petitioner's wife.

4 (c). The respondent erred in adding to petitioner's income $236.25, representing one-half of all interest received by petitioner on and after November 1, 1939.

4 (d). The respondent erred in adding to petitioner's income $607.33, representing one-half of petitioner's distributive share of the ordinary net income on and after November 1, 1939, of two partnerships in which petitioner was a member.

4 (e). The respondent erred in adding to petitioner's income $1,387.18 and in deducting from petitioner's income $954.82, resulting in a net addition to petitioner's income of $432.36. The item of $1,387.18 represents one-half of the net income on and after November 1, 1939, from all oil and gas royalties owned by petitioner, and $954.82 represents one-half of the net income on and after November 1, 1939, from all oil and gas royalties owned by petitioner's wife.

30 4 (f) (1). The respondent erred in adding to petitioner's income $4,861.29 and in deducting from petitioner's income $61.35, resulting in a net addition to petitioner's income of $4,799.94. The item of $4,861.29 represents one-half of the net income on and after November 1, 1939, from all oil and gas leases owned by petitioner, and $61.35 represents one-half of the net income on and after November 1, 1939, from all oil and gas leases owned by petitioner's wife.

4 (f) (2). The respondent erred in adding to petitioner's income that portion of the $1,865.60 of miscellaneous adjustments of leasehold depreciation and expense which, under the Oklahoma Community Property Act, should have been added to the income of petitioner's wife.

4 (g) (1). The respondent erred in adding to petitioner's income $7,036.50, representing all of petitioner's cost in certain oil and gas royalties which became worthless prior to November 1, 1939, and one-half of petitioner's cost in certain oil and gas royalties which became worthless on or after November 1, 1939.

4 (g) (2). As an alternative assignment of error to (g) (1) above, if the Oklahoma Community Property Act does not permit division between husband and wife of royalty losses or if the Act

is inoperative for Federal income tax purposes, the respondent erred in failing to allow as a deduction from petitioner's income the sum of $8,349.00, representing all of petitioner's cost in all of his oil and gas royalties which became worthless and were charged off during the calendar year 1939.

4 (h). The respondent erred in disallowing as a deduction $98.59 and in allowing as a deduction $53.14, resulting in a net addition to petitioner's income of $45.45. The item of $98.59 represents one-half of certain taxes paid by petitioner's wife on and after November 1, 1939, and $53.14 represents one-half of certain taxes paid by petitioner on and after November 1, 1939.

4 (i). The respondent erred in allowing as a deduction $15.00, representing one-half of all contributions paid by petitioner on and after November 1, 1939.

4 (j). The respondent erred in allowing as a deduction $87.68, representing one-half of expense of petitioner's field car on and after November 1, 1939.

31 4 (k). The respondent erred in allowing as a deduction $288.37, representing one-half of office expense of petitioner on and after November 1, 1939.

4 (l). The respondent erred in allowing as a deduction $4.66, representing one-half of depreciation sustained on and after November 1, 1939, upon office fixtures owned by petitioner.

4 (m). The respondent erred in allowing as a deduction $90.38, representing one-half of traveling expenses paid by petitioner on and after November 1, 1939.

4 (n). The respondent erred in allowing as a deduction $88.83, representing one-half of depreciation sustained on and after November 1, 1939, upon business cars owned by petitioner.

FACTS

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

FACTS RELATING GENERALLY TO THE ASSIGNMENTS OF ERRORS

Petitioner's books and records during the calendar year 1939 were kept on the cash basis, and his income tax return for that year was filed on this basis.

On October 26, 1939, there was filed in the office of the County Clerk of Nowata County, Oklahoma, a written election, signed by petitioner and his wife, stating that they desired to avail themselves of the provisions of the Oklahoma Community Property Act, and have this Act apply to them and to their property. A copy of this written election is attached to this Amended Petition

and marked Exhibit B. On October 27, 1939, there was filed in the office of the Secretary of State of the State of Oklahoma a duplicate original of this written election. Each of these duplicate elections was duly acknowledged in the form prescribed by Oklahoma law for acknowledgments to conveyances of real estate.

These elections, by reason of the provisions of Section One of the Oklahoma Community Property Act, caused this Act to apply to petitioner and his wife and to their property and to the income and expense applicable to them and to their property on and after November 1, 1939.

32 The income tax return of petitioner for the calendar year 1939 was filed with the Collector of Internal Revenue for the District of Oklahoma on April 15, 1940, pursuant to an extension duly granted; this return showed a tax to be due in the amount of $22,986.10. This tax petitioner paid to the Collector of Internal Revenue for the District of Oklahoma at the following times and in the following amounts: March 15, 1940, $6,500.00; June 13, 1940, $5,495.37; September 11, 1940, $5,495.37; December 10, 1940, $5,495.36.

After the mailing by respondent of his notice of deficiency dated July 29, 1941, and after the filing on September 13, 1941, of petitioner's original petition for a redetermination of the deficiency, petitioner on October 1, 1941, paid to the Collector of Internal Revenue for the District of Oklahoma the entire alleged deficiency in the amount of $11,029.95.

On October 22, 1941, petitioner filed a claim for refund of income tax for the calendar year 1939 with the Collector of Internal Revenue for the Oklahoma District in which respondent's notice of deficiency and petitioner's original petition in this proceeding were incorporated by reference. This claim for refund was for the amount of $9,300.00, or such other amount as was legally refundable, together with interest as allowed by law.

5 (a). Facts Particularly Relating to Assignment of Error 4 (a)

During the calendar year 1939, petitioner was the president of Harmon and Whitehill, Inc., an Oklahoma corporation. His salary as president for this year was $20,000.00, of which $3,333.34 was received by petitioner on and after November 1, 1939. Petitioner on his 1939 income tax return reported as salary from this corporation $18,333.33, and petitioner's wife reported on her income tax return for the calendar year 1939 as salary $1,666.67. Respondent has added to petitioner's income the $1,666.67, of salary reported by petitioner's wife in her return.

5 (b). Facts Particularly Relating to Assignment of Error 4 (b)

Petitioner on and after November 1, 1939, received in div-
33 idends upon the following corporate stocks owned by him
the following amounts: Atlantic Refining Company $50.00; Consolidated Oil Corporation, $80.00; Phillips Petroleum Company, $140.50; Standard Oil Company of Indiana, $100.00; Pure Oil Company, $50.00; Louisiana Land and Exploration Company, $50.00; Harmon & Whitehill, Inc., $9,780.00. These dividends totaled $10,250.50. Petitioner's wife on her 1939 income tax return reported one-half of these dividends, or $5,125.25.

Petitioner's wife on and after November 1, 1939, received the following dividends upon corporate stocks owned by her: Consolidated Oil Corporation, $56.00; Standard Oil Company of Indiana, $100.00; Harmon & Whitehill, Inc., $9,700.00. These dividends totaled $9,856.00. Petitioner on his 1939 income tax return reported one-half of these dividends, or $4,928.00.

Respondent has added to petitioner's income the $5,125.25 of dividends upon petitioner's stocks reported by his wife on her return, and has deducted from petitioner's income the $4,928.00 of dividends upon stocks owned by petitioner's wife which were reported by petitioner on his return. These adjustments by respondent result in a net addition to petitioner's income of $197.25.

5 (c). Facts Particularly Relating to Assignment of Error 4 (c)

Petitioner on and after November 1, 1939, received as interest upon indebtedness owed to him the following amounts from the following debtors: First National Bank and Trust Company $460.00; H. A. Hobson, $12.50. These amounts totaled $472.50. Petitioner's wife reported on her 1939 income tax return one-half of this total, or $236.25.

Respondent has added to petitioner's income the $236.25 of interest reported by petitioner's wife on her return.

5 (d). Facts Particularly Relating to Assignment of Error 4 (d)

Petitioner during the calendar year 1939 was a member of two partnerships, Atlas Oil Company and Cowdery & Harmon. The distributive share of petitioner of the ordinary net income of each of these partnerships on and after November 1, 1939, was as
34 follows: Atlas Oil Company, $425.42; Cowdery & Harmon, $789.24. These distributive shares totaled $1,214.66. Pe-

titioner's wife on her 1939 income tax return reported one-half of this total, or $607.33.

Respondent has added to petitioner's income for the calendar year 1939 $607.33, representing the portion of petitioner's distributive share of net income of these partnerships reported by his wife.

5 (e). Facts Particularly Relating to Assignment of Error 4 (e)

Petitioner on and after November 1, 1939, received from oil and gas royalties owned by him net taxable income of $2,774.36. Petitioner's wife on her 1939 income tax return reported one-half of this net income from royalties, or $1,387.18.

Petitioner's wife on and after November 1, 1939 received from oil and gas royalties owned by her net taxable income of $1,909.65. Petitioner on his 1939 income tax return reported one-half of this net income from royalties, or $954.82.

Respondent has added to petitioner's income the $1,387.18 of income from petitioner's royalties reported by his wife on her return and has deducted from petitioner's income the $954.82 of income upon royalties owned by petitioner's wife which was reported by petitioner on his return. These adjustments by respondent result in a net addition to petitioner's income of $432.36.

5 (f). Facts Particularly Relating to Assignment of Error 4 (f) (1) and 4 (f) (2)

Respondent has added to Petitioner's income from his oil and gas leases a total of $9,665.54. Of this amount, $4,865.60 arises from numerous adjustments of expense and depreciation items upon these leases. Petitioner concedes the principle upon which these adjustments were made, but does not concede that there should be added to his income that portion of the $4,865.60 which under the Oklahoma Community Property Act should have been added to the income of his wife. The balance of respondent's proposed addition to income, or $4,799.94, is in controversy in its entirety and arises under the following facts.

Petitioner on and after November 1, 1939, received from oil and gas leases owned by him net taxable income of $9,722.58. Petitioner's wife on her 1939 income tax return reported one-half of this income, or $4,861.29.

Petitioner's wife on and after November 1, 1939, received from oil and gas leases owned by her net taxable income of $122.70. Petitioner on his 1939 income tax return reported one-half of this income, or $61.35.

Respondent has added to petitioner's income the $4,861.29 of net income upon petitioner's oil and gas leases reported by his wife on her return and has deducted from petitioner's income the $61.35 of income upon oil and gas leases owned by petitioner's wife which were reported by petitioner on his return. These adjustments by respondent result in a net addition to petitioner's income of $4,799.94.

5 (g). Facts Particularly Relating to Assignment of Error 4 (g) (1) and 4 (g) (2)

Petitioner on June 24, 1939, acquired at a cost of $750.00 an undivided $\frac{1}{8}$ interest in the oil and gas rights under the northeast quarter of the northeast quarter of Section 17, Township 5 North, Range 10 East, Hughes County, Oklahoma. On July 23, 1939, a dry hole was completed on this property to a total depth of 4,612 feet. This hole was plugged and abandoned on July 24, 1939.

Petitioner on January 7, 1938, acquired for $1,575.00 a $\frac{1}{32}$ interest in the oil and gas rights under the south half of the southeast quarter of Section 12, Township 18 North, Range 1 East, Payne County, Oklahoma. Prior to November 1, 1939, there was completed as a direct off-set to this property a well which produced only water. This well was drilled to the Wilcox sand at 4,882 feet. Because of this well, the lessee of the property in which petitioner has this royalty interest has not drilled on this property and has released the lease thereon.

Petitioner on January 7, 1938, acquired for $1,824.00 a $\frac{1}{32}$ interest in the oil and gas rights under the north half of the northeast quarter of Section 18, Township 18 North, Range 2 East, Payne County, Oklahoma. A dry hole to a total depth of 4,932 feet was drilled on this property and the hole was abandoned on May 28, 1939.

36 On January 8, 1938, petitioner acquired for $1,575.00 a $\frac{1}{32}$ interest of the oil and gas rights under the south half of the southeast quarter of Section 18, Township 18 North, Range 2 East, Payne County, Oklahoma. A dry hole was drilled upon this property to the Wilcox sand to a total depth of 4,973 feet and was abandoned on May 23, 1939.

The aggregate cost in the aforesaid four royalty interests is $5,724.00. Each of these royalties was condemned by exploratory drilling prior to November 1, 1939.

On August 30, 1938, petitioner acquired for a total cost of $2,625.00 three royalty interests located in Sections 17, 19, and 20, Township 18 North, Range 3 East, Fayette County, Illinois. Exploratory drilling near each of these royalty interests caused the lessee of these interests to decide not to drill any wells on any of

these three interests. The west edge of an adjacent oil field had been defined clearly as being approximately one mile east of each of these royalty interests. This exploratory drilling and definition of the edge of the field established that each of these royalty interests became worthless on or after November 1, 1939.

Petitioner on his 1939 income tax return claimed as a deduction $7,036.50, representing all of his costs in the four oil and gas royalties which became worthless prior to November 1, 1939, and one-half of his costs in the three royalty interests which became worthless on or after November 1, 1939. Petitioner's wife in her 1939 income tax return claimed as a deduction $1,312.50 representing one-half of the costs of the three royalty interests which became worthless on or after November 1, 1939.

Respondent has disallowed as a deduction the $7,036.50 claimed by petitioner in his 1939 income tax return.

5 (h). Facts Particularly Relating to Assignment of Error 4 (h)

Petitioner on and after November 1, 1939, paid certain taxes in the total amount of $106.28. Petitioner's wife on her 1939 income tax return deducted one-half of these taxes, or $53.14.

Petitioner's wife on and after November 1, 1939, paid certain taxes in the total amount of $197.18. Petitioner on
37 his 1939 income tax return deducted one-half of these taxes, or $98.59.

Respondent has allowed as a deduction from petitioner's income the $53.14 of taxes deducted by his wife on her return and has disallowed as a deduction from petitioner's income the $98.59 of taxes claimed by petitioner on his return. These adjustments by respondent result in a net addition to petitioner's income of $45.45.

5 (i). Facts Particularly Relating to Assignment of Error 4 (i)

Petitioner on and after November 1, 1939, paid $30.00 in charitable contributions. Petitioner's wife on her 1939 income tax return deducted one-half of these contributions, or $15.00.

Respondent has allowed as an additional deduction to petitioner the $15.00 of contributions reported by petitioner's wife on her return.

5 (j) Facts Particularly Relating to Assignment of Error 4 (j)

Petitioner on and after November 1, 1939, paid as expense for a field car $175.36. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $87.68.

Respondent has allowed as an additional deduction from petitioner's income the $87.68 of field car expense deducted by petitioner's wife on her return.

5 (k). Facts Particularly Relating to Assignment of Error 4 (k)

Petitioner on and after November 1, 1939, paid office expenses totaling $576.74. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $288.37.

Respondent has allowed as an additional deduction to petitioner the $288.37 of office expenses reported by petitioner's wife on her return.

38 5 (l). Facts Particularly Relating to Assignment of Error 4 (l)

Petitioner on and after November 1, 1939, sustained depreciation of $9.32 upon office furniture and fixtures owned by him. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $4.66.

Respondent has allowed as an additional deduction to petitioner the $4.66 of depreciation claimed as a deduction by petitioner's wife on her return.

5 (m). Facts Particularly Relating to Assignment of Error 4 (m)

Petitioner on and after November 1, 1939, paid in traveling expenses $180.76. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $90.38.

Respondent has allowed as an additional deduction to petitioner the $90.38 of traveling expenses claimed as a deduction by petitioner's wife on her return.

5 (n). Facts Particularly Relating to Assignment of Error 4 (n)

Petitioner on and after November 1, 1939, sustained depreciation in the amount of $177.66 upon business automobiles owned by him. Petitioner's wife on her 1939 income tax return claimed as a deduction one-half of this amount, or $88.83.

Respondent has allowed as an additional deduction to petitioner the $88.83 of depreciation claimed as a deduction by petitioner's wife on her return.

PRAYER

6. Wherefore, petitioner prays that this Honorable Board may hear this proceeding and find and determine:

6 (a). That the effective date of the election of petitioner and his wife to come within the provisions of the Oklahoma Community Act was November 1, 1939.

6 (b). That the Oklahoma Community Property Act is a
39 valid rule of property law applicable to petitioner and his wife and to their property and to the income and expense applicable to them and to their property from and after November 1, 1939.

6 (c). That the Oklahoma Community Property Act is binding upon respondent and petitioner in the computation of petitioner's net taxable income for calendar year 1939.

6 (d). That petitioner in computing his net taxable income for the calendar year 1939 properly included one-half of the income and deductions attributable to the property owned by and to the activities of his wife for the period from and after November 1, 1939, and that he properly excluded one-half of the income and deductions attributable to the property owned by him and to his activities for the period from and after November 1, 1939.

6 (e). That respondent erred in adding to petitioner's net taxable income the items of income and deduction attributable to the property owned and to the activities of petitioner which were included in the separate return of petitioner's wife and in excluding from such taxable income the items of income and deduction attributable to the property owned by and to the activities of petitioner's wife which were included in the return of petitioner.

6 (f). That respondent erred in disallowing a deduction to petitioner in computing his net taxable income for the calendar year 1939 because of oil and gas royalties which became worthless during 1939.

6 (g). That petitioner has paid income tax for the calendar year 1939 in the total amount of $34,016.05; that $22,968.10 of this amount was paid within three years before the filing of petitioner's original petition; and that $11,029.95 was paid on October 1, 1941, after the mailing of the notice of deficiency.

6 (h). That petitioner has made an overpayment of income tax for the calendar year 1939 in the sum of approximately $9,300.00, which amount, or such other amount as this Honorable Board may determine to have been overpaid, should be credited or refunded to petitioner together with interest as allowed by law.

40 6. (i). That petitioner, on October 22, 1941, and within three years from the time of the payment of 1939 income tax of $34,016.05, duly filed a claim for refund of approximately $9,300.00 of income tax for the calendar year 1939.

6 (j). That petitioner be granted such other and further relief as may to this Honorable Board seem just and proper.

Respectfully,

HARRY A. CAMPBELL,
Philtower Building, Tulsa, Oklahoma,
ROGER S. RANDOLPH,
Philtower Building, Tulsa, Oklahoma,
HILARY D. MAHIN,
Philtower Building, Tulsa, Oklahoma,
L. KARLTON MOSTELLAR,
First National Bank Building,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

[*Duly sworn to by C. C. Harmon; jurat omitted in printing.*]

[Deficiency Letter appears at page 15.]

Exhibit B to amended petition

COMMUNITY PROPERTY ELECTION

We, C. C. Harmon and Pearl M. Harmon, husband and wife, of Nowata County, State of Oklahoma, desiring to avail ourselves of the provisions of the Community Property Law, House Bill 565 of the Seventeenth Oklahoma Legislature, which Act was duly approved by the Governor of the State of Oklahoma on May 10,
1939, do hereby elect to come within the provisions of this
41 Act as provided in Section 1 and 2 thereof, and to have it
apply to us and our property on and after the first day of November, 1939, it being our understanding and agreement that this election, when filed as provided by law, shall be binding upon us until either an absolute decree of divorce is rendered dissolving our marriage or until the death of one of us.

Dated this 26th day of October 1939.

C. C. HARMON,
Husband.
PEARL M. HARMON,
Wife.

STATE OF OKLAHOMA,
County of Nowata, ss:

Before me, R. O. Whitchurch, Jr., a Notary Public in and for said County and State on this 26th day of October, 1939, per-

sonally appeared C. C. Harmon and Pearl M. Harmon to me known to be the identical persons who executed the within and foregoing instrument, and each acknowledged to me that they executed the same as their free and voluntary acts and deeds for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

[SEAL.] R. C. WHITCHURCH, JR.,
Notary Public.

My commission expires 9/10/40.

* * * * *

STATE OF OKLAHOMA,
County of Nowata.

This instrument was filed for record on the 26 day of Oct. 1939, at 1:20 o'clock P. M. and duly recorded in book 274, page 120 of the records of this office.

C. L. WOODS,
Clerk.
MARGARET MILLS,
Deputy Clerk.

In the Tax Court of the United States

Answer to amended petition

Filed Dec. 23, 1941.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations of paragraph 1.

42 2. Admits the allegations of paragraph 2.

3. Admits that the respondent has determined and proposed a deficiency in income tax for the calendar year 1939 in the amount of $11,029.95; denies the remaining allegations of paragraph 3.

4 (a). Denies that the Commissioner committed the errors complained of in paragraph 4 (a).

4 (b). Denies that the Commissioner committed the errors complained of in paragraph 4 (b).

4 (c). Denies that the Commissioner committed the errors complained of in paragraph 4 (c).

4 (d). Denies that the Commissioner committed the errors complained of in paragraph 4 (d).

4 (e). Denies that the Commissioner committed the errors complained of in paragraph 4 (e).

4 (f) (1). Denies that the Commissioner committed the errors complained of in paragraph 4 (f) (1).

4 (f) (2). Denies that the Commissioner committed the errors complained of in paragraph 4 (f) (2).

4 (g) (1). Denies that the Commissioner committed the errors complained of in paragraph 4 (g) (1).

4 (g) (2). Denies that the Commissioner committed the errors complained of in paragraph 4 (g) (2).

4 (h). Denies that the Commissioner committed the errors complained of in paragraph 4 (h).

4 (i). Denies that the Commissioner committed the errors complained of in paragraph 4 (i).

4 (j). Denies that the Commissioner committed the errors complained of in paragraph 4 (j).

4 (k). Denies that the Commissioner committed the errors complained of in paragraph 4 (k).

4 (l). Denies that the Commissioner committed the errors complained of in paragraph 4 (l).

4 (m). Denies that the Commissioner committed the errors complained of in paragraph 4 (m).

43 4 (n). Denies that the Commissioner committed the errors complained of in paragraph 4 (n).

5. Denies the allegations of fact contained in paragraph 5, except that it is admitted that the income tax return of petitioner was filed with the Collector of Internal Revenue for the District of Oklahoma on April 15, 1940, pursuant to an extension duly granted.

5 (a). Admits the allegations of fact contained in paragraph 5 (a), except that it is denied that salary in the amount of $3,333.34 was received by petitioner on and after November 1, 1939.

5 (b). Admits that petitioner's wife on her 1939 income tax return reported dividends of $5,125.25; admits that petitioner on his 1939 income tax return reported dividends of $4,928.00; admits that respondent has added to petitioner's income the $5,125.25 of dividends upon petitioner's stocks reported by his wife on her return, and has deducted from petitioner's income the $4,928.00 of dividends upon stocks owned by petitioner's wife which were reported by petitioner on his return, and that these adjustments by respondent result in a net addition to petitioner's income of $197.25; denies the remaining allegations of fact contained in paragraph 5 (b).

5 (c). Admits that petitioner's wife reported on her 1939 income tax return interest of $236.25, and that respondent has added to petitioner's income the amount of $236.25 reported by petitioner's wife on her return; denies the remaining allegations of fact contained in paragraph 5 (c).

5 (d). Admits that petitioner during the calendar year 1939 was a member of two partnerships, Atlas Oil Company and Cowdery & Harmon; admits that respondent has added to petitioner's income for the calendar year 1939 $607.33; denies the remaining allegations of fact contained in paragraph 5 (d).

5 (e). Admits that petitioner's wife on her 1939 income tax return reported income from royalties in the amount of $1,387.18; admits that petitioner on his 1939 income tax return reported income from royalties in the amount of $954.82; admits
44 that respondent has added to petitioner's income the $1,387.18 of income from petitioner's royalties reported by his wife on her return, and has deducted from petitioner's income the $954.82 of income from royalties owned by petitioner's wife which was reported by petitioner on his return, and that these adjustments by respondent result in a net addition to petitioner's income of $432.26; denies the remaining allegations of fact contained in paragraph 5 (e).

5 (f). Admits that respondent has added to petitioner's income from his oil and gas leases a total of $9,665.54; admits that petitioner's wife on her 1939 income tax return reported income from oil and gas leases owned by petitioner in the amount of $4,861.29; admits that petitioner on his 1939 income tax return reported income from oil and gas leases owned by petitioner's wife in the amount of $61.35; admits that the respondent has added to petitioner's income the $4,861.29 of net income from petitioner's oil and gas leases reported by his wife on her return, and has deducted from petitioner's income the $61.35 of income from oil and gas leases owned by petitioner's wife which were reported by petitioner on his return, and that these adjustments by respondent result in a net addition to petitioner's income of $4,799.94; denies the remaining allegations of fact contained in paragraph 5 (f).

5 (g). Admits that petitioner on his 1939 income tax return claimed as a deduction an amount of $7,036.50; admits that petitioner's wife in her 1939 income tax return claimed as a deduction an amount of $1,312.50; admits that respondent has disallowed as a deduction the $7,036.50 claimed by petitioner in his 1939 income tax return; denies the remaining allegations of fact contained in paragraph 5 (g).

5 (h). Admits that petitioner's wife on her 1939 income tax return claimed a deduction for taxes in the amount of $53.14; admits that petitioner on his 1939 income tax return claimed a deduction for taxes in the amount of $98.59; admits that respondent has allowed as a deduction from petitioner's income the $53.14 of taxes deducted by his wife on her return, and has disallowed

as a deduction from petitioner's income the $98.59 of taxes
45 claimed by petitioner on his return, and that these adjustments by respondent result in a net addition to petitioner's income of $45.45; denies the remaining allegations of fact contained in paragraph 5 (h).

5 (i). Admits that petitioner's wife on her 1939 income tax return claimed a deduction for contributions in the amount of $15.00; admits that respondent has allowed as an additional deduction to petitioner the $15.00 of contributions reported by petitioner's wife on her return; denies the remaining allegations of fact contained in paragraph 5 (i).

5 (j). Admits that petitioner's wife on her 1939 income tax return claimed as a deduction an amount of $87.68 representing one-half of the expense for a field car; admits that respondent has allowed as an additional deduction from petitioner's income the $87.68 of field car expense deducted by petitioner's wife on her return; denies the remaining allegations of fact contained in paragraph 5 (j).

5 (k). Admits that petitioner's wife on her 1939 income tax return claimed as a deduction an amount of $288.37 representing one-half of office expenses totaling $576.74; admits that respondent has allowed as an additional deduction to petitioner the $288.37 of office expenses reported by petitioner's wife on her return; denies the remaining allegations of fact contained in paragraph 5 (k).

5 (l). Admits that petitioner's wife on her 1939 income tax return claimed as a deduction an amount of $4.66 representing one-half of depreciation of $9.32 sustained upon office furniture and fixtures owned by petitioner; admits that respondent has allowed as an additional deduction to petitioner the $4.66 of depreciation claimed as a deduction by petitioner's wife on her return; denies the remaining allegations of fact contained in paragraph 5 (l).

5 (m). Admits that petitioner's wife on her 1939 income tax return claimed as a deduction an amount of $90.38 representing one-half of traveling expenses of $180.76; admits that respondent has allowed as an additional deduction to petitioner the $90.38 of traveling expenses claimed as a deduction by petitioner's wife on her return; denies the remaining allegations of fact contained in paragraph 5 (m).

46 5 (n). Admits that petitioner's wife on her 1939 income tax return claimed as a deduction an amount of $88.83 representing one-half of depreciation sustained in the amount of $177.66 from business automobiles owned by petitioner; admits that respondent allowed as an additional deduction to petitioner

the $88.83 of depreciation claimed as a deduction by petitioner's wife on her return; denies the remaining allegations of fact contained in paragraph 5 (n).

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved.

J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

James L. Backstrom,
Division Counsel,

Stanley B. Anderson,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

Ma. 1 7-41.

In the Tax Court of the United States

Findings of fact and opinion

Promulgated November 18, 1942

1. Petitioner and his wife, residents of the State of Oklahoma, filed a declaration of intention to come under the community property law of that state effective November 1, 1939. The Oklahoma Community Property Law by its express terms applies only to husbands and wives who file such a declaration. Held, that the Oklahoma Community Property Law is to be given effect in determining Federal income tax questions and that the income of petitioner and his wife for the period November 1 to December 31, 1939, which constituted community income under the provisions of the Oklahoma statutes, may be reported in equal shares by petitioner and his wife in their separate returns, following Poe v. Seaborn, 282 U. S. 101.

2. Prior to November 1, 1939, petitioner acquired with
47 his separate property certain oil and gas royalties located in Oklahoma and Illinois. Test wells were drilled on the properties, or in some instances on nearby premises, which proved dry or commercially nonproductive during 1939. The data obtained from these drillings and other available information as to the geological structure in the areas of petitioner's properties indicated that at the close of 1939 there was little probability that oil or gas would ever be produced from petitioner's properties in

commercial quantities and that petitioner's royalties were worthless. In 1940 petitioner disposed of all of such royalties by quitclaim deeds. There have been no test drillings to the sedimentary beds or series below the proven oil producing level in the areas of petitioner's properties. Held, that petitioner's royalties became worthless in 1939 and that the cost of such royalties is deductible by petitioner in his income tax return for 1939 as a loss of that year.

Harry A. Campbell, Esq., Roger S. Randolph, Esq., and L. Karlton Mosteller, Esq., for the petitioner.

E. G. Sievers, Esq., and L. R. Vanburg, Esq., for the respondent.

This proceeding involves a deficiency of $11,029.95 in petitioner's income tax for 1939. The questions in issue are (1) whether petitioner and his wife, who are domiciled in the State of Oklahoma and who made an election, as provided by state statute, to come under the terms of the community property law of that state, may report their respective shares of community income in separate returns; and (2) whether certain oil and gas royalty interests which petitioner owned became worthless during the taxable year, giving rise to a deductible loss.

These questions have been submitted on a written stipulation of facts with exhibits attached, and the oral testimony of witnesses.

Findings of fact

Petitioner is a resident of Nowata, Oklahoma. He filed his income tax return for 1939 with the collector of internal revenue for the district of Oklahoma. Petitioner's books were kept and
48 his income tax return made on the cash basis. His return showed a tax due of $22,986.10, which has all been paid. The deficiency of $11,029.95 has likewise been paid and claim for refund in the amount of $9,300 has been filed.

The State of Oklahoma, by legislative enactment effective July 29, 1939, adopted a community property law similar to that of the State of Texas and other community property law states except that it is operative only when an election to come under the law is made by the husband and wife.

On October 26, 1939, petitioner and his wife executed and filed with the county clerk of Nowata County, Oklahoma, a "Community Property Election," stating that they desired to avail themselves of the provisions of the Oklahoma Community Property Law and to have the law apply to them and their property. A certified copy of the election was filed in the office of the Secretary of State of Oklahoma on October 27, 1939. By reason of this election the Oklahoma Community Property Law applied to them and their property on and after November 1, 1939.

For the period November 1 to December 31, 1939, inclusive, petitioner and his wife received the following income and claimed the following deductions:

	Income
Salary of petitioner	$3,333.34
Dividends from petitioner's stocks	10,250.50
Dividends from stocks of petitioner's wife	9,856.00
Interest from obligations due petitioner	242.50
Distributive share, petitioner's interests in partnerships	1,214.66
Oil royalty net income of petitioner	2,744.38
Oil royalty net income of petitioner's wife	1,909.65
Oil lease net income of petitioner	9,722.58
Oil lease net income of petitioner's wife	122.70
Total income	39,426.29

	Deduction
State and local taxes of petitioner	$106.28
State and local taxes of petitioner's wife	197.18
Charitable contributions of petitioner	30.00
Field car expense of petitioner	175.36
Office expense of petitioner	576.74
Depreciation upon petitioner's office furniture and fixtures	9.32
Travel expense of petitioner	180.76
Depreciation upon petitioner's business automobiles	177.66
Worthless royalties deducted by petitioner	2,625.00
Total deductions	4,078.30
Net income	35,347.99

Petitioner and his wife filed separate Federal income tax returns for 1939 in which they each reported one-half of
49 the foregoing amounts of income and deductions for the period November 1 to December 31, 1939. In his determination of the deficiency herein the respondent has denied the petitioner and his wife the right so to report this income and the deductions claimed.

In his separate return for 1939 petitioner claimed deductions aggregating $5,724 on account of the worthlessness of certain oil and gas royalty interests, in addition to one-half of the above shown deduction of $2,625 claimed against community income. The commissioner has disallowed the deduction of all the amounts claimed as royalty losses on the ground that petitioner's royalty interests did not in fact become worthless during the taxable year 1939. Following is a brief description of each of such interests, showing the date of acquisition, location and cost thereof, and some of the facts bearing upon the probability of future production:

On June 24, 1939, petitioner acquired, with his separate property, a one-eighth royalty interest in the northeast quarter of section 17, township 5 north, range 10 east, Hughes County, Oklahoma, at a cost of $750. A dry hole was drilled on the premises to and through the Cromwell sand (4,613 feet) on July 23, 1939. There were only two producing wells, one oil and one gas, in that area. They were about three-fourths of a mile northwest of petitioner's royalty. These wells were both drilled to the Wilcox sand

originally, but proved unproductive in that formation and were plugged back to the Cromwell sand, where they produced commercially at about 4,500 feet. The dry hole on petitioner's royalty was not drilled to the Wilcox sand, which was found to lie about 150 feet deeper there than on the producing properties. Generally a formation which has proven nonproductive at one depth will not produce at a lower depth in that area. Petitioner's royalty became worthless in July 1939, when the dry hole was drilled to a depth below the producing level in that area. No other development has ever been undertaken on petitioner's royalty.

In January 1938 petitioner acquired, with his separate property, a one thirty-second interest in three royalties located in
50 Payne County, Oklahoma, in the vicinity of a producing area known as the Ramsey Pool, which lies principally in sections 13 and 18, township 18 north, ranges 1 and 2 east, Payne County, Oklahoma. This pool was discovered in 1937 and was fully developed by the end of 1939. One of petitioner's royalties was in the southeast quarter and one in the northeast quarter of section 18 and the other was in the southeast quarter of section 12. In the order mentioned they were situated directly to the southeast, northeast, and northwest of the Ramsey Pool. In May 1939 dry holes were drilled to the Wilcox sand on both of the royalties in section 18 at points nearest the pool, one to a depth of 5,139 feet and the other to a depth of 4,932 feet. The production in the Ramsey Pool was all from the Wilcox sand at depths of from about 4,700 to 4,800 feet. Both of petitioner's royalties in section 18 became worthless in 1939 when the dry holes thereon were completed.

There has never been any development on the royalty located in section 12. During 1938 a dry hole was drilled about one-fourth of a mile directly north and another about one-half mile to the southeast of petitioner's royalty. Both of these dry holes were more than a half mile outside of the producing area. In July 1939 a well was drilled by the Mid-Continent Petroleum Corporation, the principal operator in that area, directly offsetting the southeast corner of petitioner's royalty to the south, which had an estimated initial 24-hour production or "potential" of 7,344 barrels. Thereafter, and on August 31, 1939, another well was completed by the Mid-Continent Petroleum Corporation directly offsetting the southeast corner of petitioner's royalty to the east, which had a small initial production of only 50 barrels of oil for the first 24 hours from the Wilcox sand. In August 1940 this well was plugged back to the Hunton lime, where it had an initial production of about 90 barrels for the first 24 hours. It was never considered commercially profitable. Petitioner's royalty in section 12 became completely worthless in August 1939, when the commercially non-

productive well was drilled directly offsetting the southeast corner to the east, showing that in all probability petitioner's property lay outside of the area of profitable production.

51 On August 30, 1938, the petitioner acquired with his separate property three separate oil and gas royalty interests covering premises situated in sections 17, 19, and 20, township 8 north, range 3 east, Fayette County, Illinois, at a cost of $2,625. A dry hole was drilled (1,637 feet) on one of these properties, section 17, that nearest the producing area, on September 1, 1938. On August 2, 1938, a dry hole was drilled (1,757 feet) in section 19 southwest of petitioner's property located in that section. On May 16 and June 20, 1939, respectively, two dry holes were drilled in section 16 northeast of petitioner's properties located in section 17. No further development has occurred on any of these properties. All three of petitioner's royalties became worthless in 1939 when the dry holes were completed.

During the year 1940 petitioner executed quitclaim deeds divesting himself of all interest in all of the oil and gas royalty interests described above.

The sedimentary series or beds under the properties on which petitioner's royalty interests were located and under the areas surrounding these properties and below the horizons or strata penetrated by the development in those areas have never been tested by drillings.

Opinion

SMITH, J.: Our first question is whether the petitioner and his wife, having made a statutory election to come under the Community Property Law of the State of Oklahoma, effective November 1, 1939, are entitled to report separately their respective shares of community income and deductions pertaining thereto for the period November 1 to December 31, 1939.

In the State of Oklahoma, unlike the other community property states, the community property law applies only to husbands and wives who have filed their written election to come under its terms. The pertinent provisions of the community property statutes are found in Title 32, Oklahoma Statutes Annotated, sections 51 to 65, inclusive. Sections 51 and 52 read in part as follows:

SEC. 51. Community Property Law—Election to Come Under Act.

52 This Act shall be available only to and apply only to husbands and wives and to their property for a period of time from the first day of the month in any year subsequent to their filing their written election to come under the terms of this Act until either an absolute decree of divorce is rendered dissolving their marriage, or until the death of one of them. Laws 1939, page 356, Sec. 1.

Sec. 52. Election to Come Under Act, Form of—Filing.

The written election to come under the terms of this Act, referred to in Section 1 of this Act, shall be a written instrument signed and acknowledged in duplicate by both husband and wife, stating in substance that they desire to avail themselves of the Act and have same apply to them and to their property on the first day of the next month in any year subsequent to the filing thereof in both the office of the county clerk and the Secretary of State as hereinafter provided. * * * Laws 1939, page 356, Sec. 2.

Sections 53 and 54 provide that all property, both real and personal, of the husband or wife owned or claimed by them before the effective date of the election to come under the terms of the community property law, as provided in section 1, and that acquired afterwards by gift, by division of community property, by devise, or by descent, as also "the increase of all lands thus owned or acquired," shall be their separate property subject to the control of such owner. Section 56 provides in part that:

Sec. 56. Property Deemed Community or Common Property—Control—Bank Deposits.

All property acquired by the husband or the wife after the effective date of the election to come under the terms of the Act as provided in Section 1 of this Act, except that which is separate property of either one or the other, shall be deemed the community or common property of the husband and the wife and each, subject to the provisions of this Act, shall be vested with an undivided one-half interest therein. The wife shall have the management and control and may dispose of that portion of the community property consisting of her earnings, all rents, interest, dividends,
53 incomes and other profits for her separate estate and all
other community property the title to which stands in her name. The husband shall have the management and control and may dispose of all other community property. * * * Laws 1939, page 357, Sec. 6.

Section 57 provides that the separate property of the spouses and the community property standing in the name of and subject to the management, control, and disposition of each shall be subject to the debts of such spouse but not to the debts of the other. Section 59 provides that either spouse may sell his or her interest in the community property to the other. Section 60 provides that upon the dissolution of the marriage by decree of court the community property shall be divided between the spouses in such proportions as the court shall deem just and equitable. Section 65 provides:

Sec. 65. Death of Spouse—Administration of Community Property—Interests of Survivor—Homestead.

Upon the death of the husband or the wife, the surviving spouse shall administer all community property in the same manner and with the same duties, privileges and authority as are vested in a surviving partner to administer and settle the affairs of a partnership upon the death of the other partner, as provided by Section 1197, Oklahoma Statutes 1931; provided that the surviving husband or wife shall not be disqualified from acting as executor or administrator of the estate of the deceased husband or wife; and provided further, that the survivor of the husband or wife shall pay out of the community property, except the homestead and exempt property, all debts of the community, whether created by the husband or the wife; and provided further, that when all debts of the community, shall have been fully satisfied the survivor shall transfer and convey to the administrator or executor of the deceased one-half of the community property remaining to be administered and distributed as other property of the estate either subject to the terms of the will of the deceased or under the laws of descent and distribution as the case may be, and thereafter all the interest of the surviving partner in said community property shall be that of a tenant in common; and provided further, that
54 any interest in a homestead so conveyed shall not be subject to administration under the laws of this state, except in the manner provided by law at the time of the enactment of this Act: Laws 1939, page 360, Sec. 15.

The Oklahoma community property law is said to be patterned after the Texas community property statutes (see Vernon's Civil Statutes of the State of Texas Annotated, Revision of 1925, Title 75, ch. 3) and in some of its provisions bears a close resemblance to the community property law of that state and those of the other community property states. The election provisions contained in section 51 above, however, are not found in the statutes of any other state. It is chiefly in reliance upon this dissimilarity of the state statutes, that is, the election privilege offered by the Oklahoma statutes, that the Commissioner seeks to distinguish this case from such cases as Poe v. Seaborn (Wash.), 282 U. S. 101; Hopkins v. Bacon (Tex.), 282 U. S. 122; Goodell v. Koch (Ariz.), 282 U. S. 118; Bender v. Pfaff (La.), 282 U. S. 127; and United States v. Malcolm (Cal.), 282 U. S. 792. The cited cases hold that under the community property laws of the respective states a husband and wife each has a vested one-half interest in the community income which they can each report in his separate income tax return.

The Commissioner terms the statutory election which petitioner and his wife made to come under the Oklahoma community property law an "anticipatory arrangement" such as the Supreme

Court held in Lucas v. Earl, 281 U. S. 111, to be ineffective to shift the tax burden on the husband's earnings to the wife. The Commissioner's position is that the rule of Poe v. Seaborn, supra, is applicable in those states where the community property law is self-operating and not in Oklahoma where the law operates only when invoked by a voluntary agreement between the spouses; that where the community of property is dependent upon such an expressed voluntary agreement the rule of Lucas v. Earl, supra, applies and requires that the income be reported in the return of the spouse who earns it.

This contention, we think, is unsound. In other community property states, such as California and Texas, the
55 community property statutes apply by operation of law and without any voluntary action on the part of the marital community, but they may be modified or avoided by an express agreement or declaration to that effect by the spouses. For purposes of the Federal income tax we can see but little practical difference betwen a community property law which is operative only when expressly invoked and one which operates unless expressly revoked. Contracts between husbands and wives changing or modifying the operation of the statutory community property laws of the states have been given effect in determining Federal income tax questions in a number of cases, including Helvering v. Hickman (Cal.), 70 Fed. (2d) 985; Sparkman v. Commissioner (Cal.), 112 Fed. (2d) 774; Martha Locke Shoenhair (Ariz.), 45 B. T. A. 576; Frances C. Brooks (Wash.), 43 B. T. A. 860. Thus, the election is open to the spouses domiciled in those states to have their separate earnings become community income or not, just as it is in the State of Oklahoma.

It seems to us that the argument for bringing this case under the rule of Lucas v. Earl, supra, has been considered and rejected by the Supreme Court in Poe v. Seaborn, supra, where the Court said:

In the Earl case a husband and wife contracted that any property they had or might thereafter acquire in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, "shall be treated and considered, and hereby is declared to be received, held, taken, and owned by us as joint tenants. * * *" We held that assuming the validity of the contract under local law, it still remained true that the husband's professional fees, earned in years subsequent to the date of the contract, where his individual income, "derived from salaries, wages, or compensation for personal service," under sections 210, 211, 212 (a) and 213 of the Revenue Act of 1918 (40 Stat. 1062–1065). The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have

been nothing on which it could operate. That case presents quite a different question from this, because here, by law, the earn-
56 ings are never the property of the husband, but that of the community.

In his brief the Commissioner submits that although the holding in Hopkins v. Bacon, supra, "would appear to be contradictory to the general principle heretofore mentioned [that the owner of property is taxable on all of the income therefrom, Reinecke v. Smith, 289 U. S. 172; Blair v. Commissioner, 300 U. S. 5; Harrison v. Schaffner, 312 U. S. 579; Helvering v. Clifford, 309 U. S. 331]; the two principles are compatible since each governs separate and distinct factual situations, and considerations of policy dictated to a great extent the contrary results reached." Admitting the possibility of the contrary or contradictory results suggested (see Helvering v. Hickman, supra),[1] we think that the reconciliation offered leads away from rather than to the respondent's goal. The factual situation here obviously is more like that in Hopkins v. Bacon, supra, than that in any of the cases offered as establishing the opposing principle, since none of the latter cases involved any question of community income or community property rights under state laws. Likewise, any consideration of "policy" that may have prompted the Court in reaching its decision in Poe v. Seaborn, supra; Hopkins v. Bacon, supra, and like cases, must have found root in the community property statutes of the states in which they arose, for without those statutes, and even if substantially the same provisions which they contain had been embodied in a private contract between the spouses, a question entirely different from that considered in Lucas v. Earl, supra, would have confronted the Court; namely, whether a husband and wife in a noncommunity property state may by a private contract establish a legally recognized community of property. Assuming, as we may, that the Oklahoma community property law is similar in purpose and effect to the community property law of Texas, on which it was patterned, the same considerations of policy would necessarily govern in determining their effect on Federal taxation.

57 From its earliest history the law of the community, in some if not all of the sources of its origin, has embodied the concept of a voluntary agreement between the members of the community. For instance, prior to the adoption of the Code Napoleon, by which the law of the community was made a part of the general law of France, the community of property was excluded in some jurisdictions, in which the Roman law prevailed

[1] "Whether the Earl case is entirely consistent with the later case of Poe v. Seaborn, supra, we need not inquire, for the later decision is controlling. * * *" Helvering v. Hickman, 70 Fed. (2d) 985, 987.]

but might be adopted by contract. In McKay's Community Property, 2d Ed., it is said that:

§ 147. Contract is the basis of the conventional community.—* * * A purely conventional community may be formed and may operate in a state or country where marital rights are not regulated by the law of the community. It is enough that the law does not in express terms or by implication forbid it. Where the law of the state recognizes community and provides for it, the contract of the spouses need not provide for every legal detail of the association but may leave much to the law and the law will be embodied in their contract where it is not in terms excluded. The contract and the law supplement each other and are construed together as though the law were, in terms, written into the contract. But in spite of this co-operation of contract and law, the basis of the association is contractual. In brief, contract forms the basis of that form of the marital property association called the conventional community.

§ 148. Contract is the basis of the modified legal community.—The modified legal community like the conventional is based on contract. In a modified legal community the spouses simply agree to some change in the code or statute, and leave the remainder untouched by their contract. In such a case they not merely make their contract with reference to the law but, are deemed to incorporate the unchanged provisions of the legal community into their contract, and clearly contract is the legal basis of this form of community.

§ 149. The sense in which tacit contract is the basis of the legal community.—* * * And when two marry and one of the known consequences of their marriage in the absence
58 of a contract to the contrary, is the formation of a marital property arrangment called the legal community, they are deemed to agree to that arrangment, just as much as when a modified community is created by a change of some provision of the law, or when a larger measure of change is made by the formation of the conventional community.

* * * * *

§ 158. The doctrine in the common-law states.—Common law and common sense recognize the distinction between casting a system of legal rights and obligations upon persons; and offering them that system to be accepted or rejected. The law of community in these seven common-law states is not cast upon the spouses; it is offered to them and their acceptance of it is proven by the absence of a contract excluding or modifying it.

The present Civil Code of Louisiana, article 2807, provides that "The community of property, created by marriage * * * is the effect of a contract."

In states where the community property law is self-operating, a marriage, in itself, is a voluntary contract or "anticipatory arrangement" by which the contracting parties agree that their separate earnings shall become community income. This might be said also of an agreement between the spouses to move their domicile from a noncommunity property state to a community property state, with the intention of coming under the community property law of the new domicile. We are told that the avowed purpose of the enactment of the Oklahoma community property law was to prevent the exodus of wealthy citizens of that state to Texas and other community property states where they might obtain a tax benefit from the community property laws. Nevertheless the right of husband and wife to file separate returns dividing the community income and deductions in the state of the new domicile is not denied to them.

We think that in his present contention the respondent fails to make a necessary distinction between agreements or assignments of a strictly private character, like that involved in Lucas v. Earl,
supra, and a public declaration or "election" to come under
59 the general community property law of the State of Okla-
homa. Such an election is more than a mere assignment of earnings; it is a permanent, irrevocable change in the property rights of the spouses as to all future earnings of both during the continuance of the marital status. These property rights are thereafter determined not by any provisions of the election itself, but by the statutory laws of the state.

The respondent further states in his brief that "The identity of the person properly taxable for the income involved in this proceeding is to be determined without regard to the law of the State of Oklahoma." This contention, we think, is contrary to the position taken by the Supreme Court in its consideration of prior community property questions. For instance, in United States v. Robbins, 269 U. S. 315, the Court, upon examination of the statutory law and decisions of the courts of the State of California, determined that the wife had a mere expectancy in the community property and not a vested interest and that the husband was therefore taxable on all of the community income. In the following year, 1927, the California statutes were amended by the addition of section 161a, defining the interests of husband and wife in the community property as "present, existing and equal interests under the management and control of the husband." Based on the amended statutes, the Supreme Court held in United States v. Mal-

colm, supra, that the wife had such an interest in the community income as to subject her to Federal income tax on her portion thereof.

In Poe v. Seaborn, supra, the Court said:

> The Commissioner concedes that the answer to the question involved in the cause must be found in the provisions of the law of the State, as to a wife's ownership of or interest in community property. What, then, is the law of Washington as to the ownership of community property and of community income including the earnings of the husband's and wife's labor?
>
> *The answer is found in the statutes of the State, and the decisions interpreting them.* [Italics supplied.]

The Court further said, in distinguishing Lucas v. Earl,
60 supra, "That case presents quite a different question from this, because, here, *by law*, the earnings are never the property of the husband, but that of the community." [Italics supplied.] See also Helvering v. Hickman, supra; Sparkman v. Commissioner, supra; Van Every v. Commissioner, 108 Fed. (2d) 650; Martha Locke Shoenhair, supra, and like cases involving the question of the effect, under state laws, of agreements between husband and wife supplementing or modifying the community property laws of the states.

The respondent further states in his brief that:

> Respondent also contends, as hereinafter more fully developed, that since no special reference is made by Congress in the Internal Revenue Code to income which is deemed community property under State law, the well-established rule that "state law may control only when the federal taxing act by express language or necessary implication, makes its own operation dependent upon state law," is applicable as to the taxability of Oklahoma community income. Burnet v. Harmel, 287 U. S. 103. This rule was repeated in Palmer v. Bender, 287 U. S. 551; Thomas v. Perkins 301 U. S. 655; Biddle v. Commissioner, 302 U. S. 573; and Morgan v. Commissioner, 309 U. S. 78. It is a rule which makes for uniformity in Federal taxation. * * *

This contention, like much of the other argument contained in the respondent's brief, obviously is directed to the general question of whether the community property laws of the states are to be given effect in determining Federal income tax questions. We deem that question foreclosed by the decisions of the Supreme Court in Poe v. Seaborn, supra, and other cases discussed above.

A further contention of the respondent is that the husband and wife, after electing to come under the community property law, each continues to enjoy most of the rights of ownership in the income from his separate earnings and from his separate properties

and is therefore taxable on such income, notwithstanding that it is labeled community income.

61 Just what are the esential rights of the individual spouses in the community property? First, all of the property of both husband and wife is divided into two classes—separate property and community property. All of the separate earnings of the spouses and the income from their separate properties, except the increase of lands separately owned, are community property. The wife has the management and control, and the right to dispose of, that portion of the community property consisting of "her earnings, all rents, interest, dividends, income and other profits for her separate estate and all other community property the title to which stands in her name" (§ 56). The husband has the management and control and may dispose of all other community property (§§ 53 to 56, inclusive). The portion of the community property under management and control of one of the spouses is not subject to the debts and liabilities of the other (§§ 57 and 58). Upon separation by court decree, the community property is divided between the parties by the court granting the decree in such proportions as the court deems just and equitable (§ 60). Upon the death of either spouse one-half of the community property, after payment of community debts, is administered as a part of the deceased spouse's estate and the other half remains the property of the surviving spouse.

The management and control over community property are not property rights and do not determine the ownership of the property. Warburton v. White, 176 U. S. 484; Poe v. Seaborn, supra. In all of the community property states the management and control of community property are regulated by statute. In most of the states, including California, Louisiana, New Mexico, and Washington, the husband is given the general management and control of the community property, with limited powers of disposal of all or portions of it. The real property in all of the states is under the management and control of the husband. In Idaho, as in Oklahoma, the wife is given the management and control of her personal earnings and the rents and profits of her separate estate. In Texas, likewise, the wife has the management and control and the power to dispose of her personal earnings, the rents from her personal estate, the interest on her bonds
62 and notes; and the dividends on her stocks. See Robbins v. United States, 5 Fed. (2d) 690, 695, 696. In Nevada the wife is given the management and control of the earnings and accumulations of herself and her minor children living with her when such earnings and accumulations are used for the care and maintenance of the family. See Nevada Comp. Laws (1929) Hillyer, § 3360.

In its opinion in Robbins v. United States, supra, the lower court made a thorough exposition of the community property laws of the then eight community property states for the purpose of comparing them with the California community property law, particularly with respect to the separate rights of the husband and wife in the community property. The court reached the conclusion that under the California law the wife acquired rights in the community property equal to or greater than those acquired by wives in some of the other recognized community property states, and that such rights constituted a vested estate. The United States Supreme Court reversed the lower court, principally upon the ground that under the decisions of the Supreme Court of California the wife had no vested estate, but a mere expectancy in the community property which did not materialize until the husband's death. Thereafter, in April 1927, the California statutes were amended to provide that:

> § 161a. Interests in community property. The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

The question of the right of a wife in California to report separately her share of the community income was again presented to the United States Supreme Court in United States v. Malcolm, supra (1931). Two questions were certified to the Court from the Circuit Court of Appeals for the Ninth Circuit, viz.:

(1) Under the applicable provisions of the Revenue Act
63 of 1928, must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?

(2) Has the wife, under section 161a of the Civil Code of California, such an interest in the community income that she should separately report and pay tax on one-half of such income?

In a per curiam opinion, and upon authority of Poe v. Seaborn, supra; Goodell v. Koch, supra; and Hopkins v. Bacon, supra, the first question was answered "no" and the second "yes." The Court considered the amendatory provisions of the California law (§ 161a above) declaring the wife's interest in the community property to be a "present, existing" interest sufficient to bring the California case under the rule prevailing in the other community property states, without the necessity of any discussion of the property rights comprising that interest, which had remained substantially the same as when the Robbins case was decided.

While there are certain differences which might be pointed out between the rights of the spouses in the community property under the California law and under the Oklahoma law, we do not think that they require a different treatment of the community income for the purpose of the Federal income tax. What is of more weight here is that the Oklahoma statutes (§ 56) carry a provision similar to that found in section 161a of the California statutes, that the husband and wife each "shall be vested with an undivided one-half interest" in the community property.

We think that the Oklahoma community property law, once properly invoked by a husband and wife resident in that state, creates in each of the spouses a vested estate in one-half of the community property which must be given recognition for Federal income tax purposes.

The respondent does not make any contention that any of the income here in controversy, as identified in our findings of fact above, was not community income under the Oklahoma statutes. We think that it all was community income. None of it was "separate property" as defined in sections 53 and 54 of the Okla-
64 homa statutes, referred to above. The Supreme Court of
the State of Oklahoma in Harmon v. Oklahoma Tax Commission, 189 Okla. 475; 118 Pac. (2d) 205, a case involving this petitioner's state income tax liability for the period November 1 to December 31, 1939, has upheld the validity of the community property statutes of the state and has construed them as bringing within the community such items of income of both husband and wife as are in controversy in this proceeding. The law of the state of Oklahoma, as so construed by the highest court of the state, is controlling in this proceeding as to what income is community income and what separate income.

It is settled law in the State of Oklahoma that oil and gas in place do not constitute a part of the realty; that no title therein vests until the oil or gas is reduced to possession; and that all income realized from the sale of oil and gas after election to come under the community property law is community income, even though produced from separately owned property. Harmon v. Oklahoma Tax Commission, supra; Rich v. Doneghey, 71 Okla. 204; 177 Pac. 86; Alexander v. King, 46 Fed. (2d) 235; certiorari denied, 283 U. S. 845. On the other hand, the profit from the sale, after the election to come under the community property law of the state, of an interest in an oil and gas lease previously owned by one of the spouses is the separate income of such spouse and not community income. Harmon v. Oklahoma Tax Commission, supra. The stipulation in this proceeding is that both petitioner and his wife during November and December 1939 "received from oil and gas royalties" and "received from oil and gas leases" cer-

tain amounts of income from royalties and leases which they had previously acquired with their separate properties. We construe the stipulation to mean that this income was derived from the sale of oil and gas and not from the sale of the royalty interests or leases themselves. As such it was community income and not separate income of the spouses.

The deductions allowable in computing the net income of the community are those incidental to the production of the community gross income, such as expenses, depreciation, interest, and taxes. Each spouse is chargable with one-half of the com-
65 munity gross income and is allowed one-half of the available deductions. Mellie Esperson Stewart, 35 B. T. A. 406; affd., 95 Fed. (2d) 821.

The respondent has allowed the deduction, either to the petitioner or his wife, of all of the items set forth above in our findings of fact as deductions claimed, except the worthless oil and gas royalties. That question is discussed separately below. It is to be noted, however, that among the community deductions claimed is an item of $30 designated "Charitable contributions of petitioner." This deduction is personal to the petitioner and is in no way related to the production of the community income. It is therefore not an allowable deduction against the community gross income. Mellie Esperson Stewart, supra.

The respondent has disallowed all of the deductions claimed, either be petitioner or his wife, on account of worthless oil and gas royalties on the ground that such royalties were not shown to have become worthless in 1939.

An oil and gas royalty interest, such as those here under consideration, is the right to a share of the production, or of the profit from production, of oil and gas received by the owner of the land or the mineral rights therein. See Curlee v. Anderson & Patterson (Tex. Civ. App.); 235 S. W. 622. It is usually acquired directly from the owner of the land, or from another royalty interest owner. It may run with the land, in perpetuity, or with a lease for a term of years. See B. G. Adams, 5 B. T. A. 113; Roy Nichols, 14 B. T. A. 1347.

The respondent's contentions are that a royalty interest can not be considered worthless until it has been proven that there is no possibility of obtaining oil or gas production from any of the underlying sedimentary beds which can be reached under standard present day practices of drilling; that there must have been test drillings on the property or in the immediate vicinity down to the bottom of the sedimentary beds, that is, to the granite or other underlying base formation generally recognized as containing no oil or gas. In his brief the respondent states his position as follows:

* * * In other words, respondent's position is bottomed
66 on the fact that the search for oil or gas, by virtue of the nature and occurrence of the subject matter, is uncertain; uncertain because the known-producing sands are not necessarily uniform in occurrence and thickness and may be absent completely in some places because of having pinched out or because of other geologic conditions; and uncertain because it is impossible in advance of drilling to determine the possibilities of finding oil or gas in the lower and deeper sedimentary series.

The respondent goes to considerable length in his brief tracing the history of this question through the various Bureau rulings and decisions of the Board of Tax Appeals and the courts. He urges that the uncertainty and confusion that have long attended the administration of the loss provisions of the act in respect of oil and gas properties be put at rest by the establishment of a definite principle, such as that which he now offers, for future guidance.

However helpful it might prove, as an administrative aid, to lay down a rule of that sort, we can not go beyond the boundaries set by the statute itself. The deduction allowed by the statute, section 23 (e) of the Revenue Act of 1938, is for "losses sustained during the taxable year." The statute makes no distinction between losses of different types of property. It has been construed as relating generally to "realized losses." Lucas v. American Code Co., 280 U. S. 445. In that case the Supreme Court said:

> Generally speaking, the income tax law is concerned only with realized losses. * * * Exception is made however, in the case of losses which are so reasonably certain in fact and ascertainable in amount as to justify their deduction, in certain circumstances, before they are absolutely realized. * * * The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal, test. * * *

A deductible loss is realized upon the happening of some identifiable event by which the property is rendered worthless. United States v. White Dental Manufacturing Co., 274 U. S. 398.
67 In Rhodes v. Commissioner (C. C. A., 6th Cir), 100 Fed. (2d) 966, decided January 17, 1939, the court held, reversing the Board, that a deductible loss was sustained on Florida real estate in 1927, when the taxpayer determined that the property was worthless, defaulted on his purchase money notes and taxes, and charged off the cost of the property in his books. The Board had held, sustaining the Commissioner's determination, that the loss deduction should be taken in 1928 when the taxpayer fortuitously sold the property for a consideration of about one-twentieth of the purchase price. In its opinion the court said:

> Common sense interpretation is the safest rule to follow in the administration of income tax laws. Gross income and deductions

flow from trade, commerce and dealings in property carried on in the ordinary business way and in the determination of taxes men should measure both by ordinary, everyday business standards. Compare Woolford Realty Co. v. Rose, Collector, 286 U. S. 319, 332, 52 S. Ct. 568, 76 L. Ed. 1128; United States v. Hardy, 4 Cir., 74 F. 2d 841. In arriving at losses the taxpayer should determine in the first instance the tax year in which sustained and such deductions should be allowed by the Commissioner of Internal Revenue unless it appears from the facts that the taxpayer was clearly unreasonable and unfair at the time he was compelled to make his decision. Subsequent events may show a taxpayer to have been wrong but these must have been ascertainable by the exercise of ordinary business care and judgment at the time he made his income tax return.

* * * * *

The fact that a taxpayer recovers a small part of a loss in a subsequent year does not invalidate it as much when its deduction in the year taken was based on the exercise of reasonable judgment from facts then known. United States v. S. S. White Dental Mfg. Company, 274 U. S. 398, 403, 47 S. Ct. 598, 71 L. Ed. 1120. Such recovery becomes a part of gross income the year of receipt. Burnet, Commissioner v. Sanford & Brooks Company, 282 U. S. 359, 367, 51 S. Ct. 150, 75 L. Ed. 383; Cooper v. United States, 8 Cir., 9 F. 2d. 216.

68 See also Bickerstaff v. Commissioner, 128 Fed. (2d), 366, reversing 44 B. T. A. 457.

To say that one class of property, such as shares of stock, becomes worthless when it no longer has sale value and that another, such as oil and gas royalties, does not become worthless, although entirely lacking sale value, if the title to the property is still held by the taxpayer, or if drilling has been made to certain specified depths, or if some other condition has not been met, is to set up a standard not authorized by the law or established by long standing usage. Cf. W. W. Hoffman, 40 B. T. A. 459; Alice V. Gordon, 46 B. T. A. 1201. In determining a taxpayer's right to a loss deduction on account of any worthless property, all of the various factors bearing on worthlessness must be given their proper weight. An oil and gas royalty interest, we think, like any other type of property, becomes worthless upon the happening of some event which results in the loss of its sale value in the ordinary channels of trade and would cause a prudent and informed business man to eliminate it from the asset side of his balance sheet. This worthlessness may be due to exhaustion of the oil and gas underlying the property, the proven non-existence of oil or gas, or the mere improbability that oil or gas in profitable quantities will ever be available.

Under one of the Bureau's earliest rulings, O. D. 375, C. B. No. 2 (1920), p. 128, the deduction of losses on account of oil royalties becoming worthless was allowed where "such interests prove worthless, as evidenced by all wells proving dry or failing after producing very small quantities of oil." In 1926 S. M. 5700, C. B. V-1, p. 241, was promulgated, holding that in order for the deduction to be allowable the lease must have expired or been canceled, or the owner must have relinquished or otherwise dispossessed himself of all title to and interest therein during the taxable year. See also I. T. 2289, C. B. V-1 (1926), p. 241, revoking O. D. 375. The Board declined to accept the principle established by S. M. 5700 and adhered generally to the more liberal rule offered in O. D. 375. See A. L. Huey, 4 B. T. A. 370; W. H. Morefield, 4 B. T. A. 394; B. G. Adams, supra; C. W. Carey, 6 B. T. A. 539; United
69 Oil Co., 25 B. T. A. 101. But see Roy Nichols, supra, where the Board held that, although certain royalty interests lost their sale value when dry holes were drilled to the Wilcox sand but were still held by the taxpayer, they could not be deducted as a loss in that year

In 1928 G. C. M. 3890, C. B. VII-1, p. 168, was promulgated, relaxing to some extent the rule established in S. M. 5700 and allowing the deduction upon proof that there was no oil or gas in the land. The ruling reads in part as follows:

* * * Whether an oil and gas lease and/or royalty right comprehend a present interest or estate in the realty itself or in the oil and gas in place * * * they bear a value in direct relation to the presence of oil and gas in the land in commercial quantities. Where there is no oil or gas in the land, the oil and gas lease and royalty right relate to a nonexistent subject matter and have absolutely no value. It would appear that the right to extract oil and gas, or to share in the same when produced, becomes worthless when the subject matter of the right is found to be nonexistent. It is believed that formal disposal of the valueless interest by sale or relinquishment should not be required as a prerequisite to allowance of a loss. A careful prospect of the entire field which demonstrates that the same is barren of oil in commercial quantities may establish the absolute worthlessness of the investment in an oil and gas lease or royalty right. * * *

In Chaparral Oil Co., 43 B. T. A. 457, the Board held, expressing approval of the above quoted portion of G. C. M. 3890, that the cost of an oil and gas lease was deductible as a loss in 1935 when it was demonstrated by new drillings that the oil under the premises lay structually below the water line of adjacent producing fields and that the lease was therefore commercially nonproductive and worthless. There had never been any drillings on properties cov-

ered by the lease, but this was not considered essential to the establishment of worthlessness. Based on data obtained from drillings on adjacent premises, geologists familiar with the conditions in that area had concluded that there was little prob-
70 ability of profitable production on the premises. The cases principally relied upon by the Board in that case were those dealing with losses generally such as United States v. White Dental Manufacturing Co., supra; Royal Packing Co. v. Commissioner (C. C. A., 3d Cir.), 22 Fed. (2d) 536; Morton v. Commissioner (C. C. A., 7th Cir.), 112 Fed. (2d) 320; and Keeney v. Commissioner (C. C. A., 2d Cir.), 116 Fed. (2d) 401, all of which dealt with deductions claimed on account of worthless stock.

In the instant case the preponderance of evidence is that all of the royalty interests in question become worthless in 1939. Dry wells had been drilled, some in 1938 and some in 1939, either on petitioner's properties or nearby premises, to depths below those of the producing wells in the vicinity. Two well qualified geologists testified in this proceeding that in their opinion, based on the stipulated facts and on data made available by drillings on or in the vicinity of the petitioner's properties, and their knowledge of the established geological formations in those areas, there was little prospect by the close of 1939 that oil in commercial quantities would ever be produced from any of petitioner's properties and that each of the petitioner's royalty interests became worthless in 1939 or partly in 1938 and partly in 1939.

On the other hand, two equally well qualified witnesses testified on behalf of the respondent that in their opinions petitioner's royalty interests did not become absolutely worthless in 1939; that they thought it possible that the sedimentary beds beneath the lowest known oil producing formations in those areas might be found to contain oil; and that since, as stipulated, these lower sedimentary beds had not been tested by drillings, the worthlessness of petitioner's royalties had not been proven. On being asked by Government counsel the reason for his opinion that petitioner's royalties were not worthless in 1939, one of the respondent's witnesses replied:

A. Because all of the sedimentary beds that may contain oil and gas adjacent to or underneath these royalties have not been penetrated by the drill.

In the light of the witnesses' interesting and instructive
71 explanations of the geological conditions attending the presence of oil deposits and the ever increasing efficiency of mechanical devices for its extraction, the possibility of the recovery of oil at some time in the future from some of the lower unexplored regions of petitioner's properties may be admitted. We do not

think, however, that this mere "possibility" of future production is in itself sufficient to give value to oil royalties which have been condemned as worthless by those engaged in the trade and familiar with the development in those particular areas. In the absence of a clear expression of such as intent by Congress, we do not think that section 23 (e) should be construed as requiring the owner of an oil and gas royalty interest which informed and reputable operators consider unfavorable for development to bear the large expense of drilling a test well, or else to dispose of his royalty for which there is no sale value.

Maps of each of petitioner's royalty interests were submitted in evidence showing the location of the properties in relation to the oil pool, if any, and the completed wells, both dry and producing. These maps show that petitioner's properties for the most part were beyond, or at least on the outer fringe, of the proven productive areas.

The respondent concedes in his brief that "if the Board approves petitioner's approach to the question. * * * several of the royalties are demonstrated to have become worthless in the taxable year." On the evidence of record we have found as a fact that all of the royalties in question became worthless during 1939.

These royalty interests were acquired by the petitioner before November 1, 1939, and were his separate property. The losses were not operating losses but were the losses of petitioner's capital investment in the properties. The Supreme Court of the State of Oklahoma has ruled that the profit from the sale of an oil and gas lease owned by one of the spouses before the effective date of their declaration to come under the community property law of the state is the separate income of such spouse and does not go into community income. Harmon v. Oklahoma Tax Commission, supra.
72 It follows that the loss of such property is the loss of the individual owner and not of the community. Petitioner is therefore entitled to the deduction of the entire amount of such losses in his individual return for 1939.

Decision will be entered under Rule 50.

In the Tax Court of the United States

Decision

Pursuant to the court's Findings of Fact and Opinion, promulgated November 18, 1942, the parties herein having filed an agreed recomputation of tax on January 22, 1943, now, therefore, it is

Ordered and Decided: That there is an overpayment in income tax for the calendar year 1939 in the amount of $9,020.74, which

amount was paid within three years before the filing of the petition (Section 322 (d), Revenue Act of 1938).

Enter:

Entered Jan. 26, 1943.

(SEAL) CHARLES P. SMITH, *Judge*.

In the Tax Court of the United States

Stipulation of facts

Filed March 30, 1942

The parties to the above-styled proceeding, by their respective counsel of record, hereby stipulate and agree as follows:

Facts Relating Generally to the Assignments of Errors

1. Petitioner is an individual with residence and office at Nowata, Oklahoma. Petitioner's books and records during the calendar year 1939 were kept on the cash basis, and his income-tax return for that year was filed on this basis with the Collector of Internal Revenue for the Oklahoma District on April 15, 1940, pursuant to an extension of time duly granted, and disclosed a tax to
73 be due in the amount of $22,986.10. This tax petitioner paid to the Collector of Internal Revenue for the District of Oklahoma at the following times and in the following amounts: March 15, 1940, $6,500.00; June 13, 1940, $5,495.37; September 11, 1940, $5,495.37; December 10, 1940, $5,495.36. On July 29, 1941, respondent mailed to petitioner a notice of deficiency proposing additional income tax for the calendar year 1939 in the amount of $11,029.95. On September 13, 1941, petitioner duly filed his petition with the Board of Tax Appeals for a redetermination of this deficiency. On October 1, 1941, petitioner paid to the Collector of Internal Revenue for the District of Oklahoma the entire alleged deficiency of $11,029.95. On October 22, 1941, petitioner filed a claim for refund of income tax for the calendar year 1939 in the amount of $9,300.00 or such other amount as might be determined to be lawfully refundable, plus interest as allowed by law, with the Collector of Internal Revenue for the Oklahoma District, in which respondent's notice of deficiency and petitioner's original petition to the Board of Tax Appeals in this proceeding were incorporated by reference. On October 24, 1941, petitioner duly filed an amended petition with the Board of Tax Appeals. Copies of the notice of deficiency dated July 29, 1941, and of the statement referred to in such notice, are attached to petitioner's original and amended petitions, marked "Exhibit A," and by this reference made a part hereof.

2. On October 26, 1939 there was duly filed in the office of the County Clerk of Nowata County, Oklahoma, a written election signed by petitioner and his wife, stating that they desired to avail themselves of the provisions of the Oklahoma Community Property Act and to have this Act apply to them and to their property. A certified copy of this written election is attached hereto, marked "Petitioner's Exhibit A," and made a part hereof. On October 27, 1939 there was duly filed in the office of the Secretary of State of Oklahoma a duplicate original of the written election referred to above. A certified copy of this duplicate original is attached hereto, marked "Petitioner's Exhibit B," and made a part hereof. Each of these written elections was filed and duly acknowledged in the form prescribed by Oklahoma law for acknowledgments to conveyances of real estate.

74 3. Facts Particularly Relating to Assignment of Error 4 (a)

During the calendar year 1939 petitioner was president of Harmon and Whitehill, Inc., an Oklahoma corporation. His salary as president of this corporation for the year 1939 was $20,000.00, of which $3,333.34 is salary allocable to November and December 1939. Petitioner, on his 1939 income tax return, reported as salary from this corporation $18,333.33 and petitioner's wife reported, on her 1939 income tax return, the sum of $1,666.67, being one half (½) of petitioner's salary from this corporation allocable to the months of November and December, 1939. Respondent added to petitioner's income for 1939 the $1,666.67 of salary reported by petitioner's wife in her return, and excluded the same from her 1939 income.

4. Facts Particularly Relating to Assignment of Error 4 (b)

(a) Petitioner, during November and December 1939, received in dividends upon the following corporate stocks the following amounts: Atlantic Refining Company, $50.00; Consolidated Oil Corporation, $80.00; Phillips Petroleum Company, $140.50; Standard Oil Company of Indiana, $100.00; Pure Oil Company, $50.00; Louisiana Land and Exploration Company, $50.00; Harmon & Whitehill, Inc., $9,780.00. All of these corporate stocks were owned by petitioner, having been acquired by petitioner with his separate property prior to November 1, 1939. These dividends total $10,250.00. Petitioner's wife, on her 1939 income tax return, reported one half (½) of these dividends, or $5,125.25.

(b) Petitioner's wife, during November and December 1939, received the following dividends upon the following corporate

stocks: Consolidated Oil Corporation, $56.00; Standard Oil Company of Indiana, $100.00; Harmon & Whitehill, Inc., $9,700.00. These dividends total $9,856.00. All of these corporate stocks were owned by petitioner's wife, having been acquired by petitioner's wife with her separate property prior to November 1, 1939. Petitioner, on his 1939 income tax return, reported one half (½) of these dividends, or $4,928.00.

(c) Respondent added to petitioner's income for 1939
75 the $5,125.25 of dividends upon petitioner's stocks reported by his wife on her 1939 return and excluded the same from the 1939 income of petitioner's wife, and excluded from petitioner's income for 1939 the $4,928.00 of dividends upon stocks owned by petitioner's wife which were reported by petitioner on his 1939 return and included the same in the 1939 income of petitioner's wife. As a result of these adjustments, respondent added to petitioner's 1939 income $197.25.

5. Facts Particularly Relating to Assignment of Error 4 (c)

(a) Petitioner, during 1939, received as interest the following amounts from the following debtors: First National Bank, Nowata, Oklahoma, $460.00; H. A. Hobson, Cleveland, Ohio, $12.50. These amounts total $472.50. The obligations with respect to which this interest was received were owned by petitioner, having been acquired by the petitioner with his separate property prior to November 1, 1939.

(b) Petitioner, on his 1939 return, reported one-half (½) of the interest of $460.00 received from the First National Bank, Nowata, Oklahoma, or $230.00, and petitioner's wife, on her 1939 return, reported the remaining one-half (½) of this interest, or $230.00. The petitioner, during 1939 and prior to November 1, 1939, received $230.00 of this interest item of $460.00, and, during November and December, 1939, received $230.00, being the balance of this interest item of $460.00. Petitioner received, during November and December, 1939, the H. A. Hobson interest of $12.50.

(c) The respondent, in his notice of deficiency, added to petitioner's 1939 income the sum of $236.25, being one-half (½) of the $460.00 interest referred to in items (a) and (b) of this numbered paragraph, plus one-half (½) of the H. A. Hobson interest of $12.50 referred to in items (a) and (b) of this numbered paragraph, which sum of $236.25 was reported by petitioner's wife on her 1939 return, and excluded the same from the 1939 income of petitioner's wife.

76 (d) Petitioner concedes that the adjustment made by the respondent in his notice of deficiency, as outlined in item

(c) of this numbered paragraph, is correct to the extent of the sum of $130.00.

6. Facts Particularly Relating to Assignment of Error 4 (d)

(a) Petitioner, during the calendar year 1939, was a member of two partnerships, Atlas Oil Company and Cowdery & Harmon. The petitioner acquired the interests which he owned in these partnerships with his separate property prior to November 1, 1939. The distributive share of petitioner of the ordinary net income of each of these partnerships during November and December, 1939, was as follows: Atlas Oil Company, $425.42; Cowdery & Harmon, $789.24. These distributive shares totaled $1,214.66. Petitioner's wife, on her 1939 income tax return, reported one-half (½) of this total, or $607.33.

(b) Respondent added to petitioner's income for 1939 $607.33, representing the portion of petitioner's distributive shares of net incomes of these partnerships reported by his wife, and excluded the same from the 1939 income of petitioner's wife.

7. Facts Particularly Relating to Assignment of Error 4 (e)

(a) Petitioner, during November and December 1939, received from oil and gas royalties covering premises situated in the states indicated below net taxable incomes in the amounts also indicated below:

Oklahoma oil and gas royalty net taxable income	$1,172.89
Texas oil and gas royalty net taxable income	253.22
Arkansas oil and gas royalty net taxable income	895.65
New Mexico oil and gas royalty net taxable income	226.21
Illinois oil and gas royalty net taxable income	226.39
Total oil and gas royalty net taxable income	2,774.36

All of these royalties were owned by petitioner, having been acquired by the petitioner with his separate property prior
77 to November 1, 1939. Petitioner's wife, on her 1939 return, reported one-half (½) of this net income from royalties, or $1,387.18.

(b) Petitioner's wife, during November and December 1939, received from oil and gas royalties owned by her covering premises situated in the states indicated below net taxable incomes in the amounts also indicated below:

Kansas oil and gas royalty net taxable income	$392.31
Oklahoma oil and gas royalty net taxable income	1,517.34
Total oil and gas royalty net taxable income	1,909.65

All of these royalties were owned by petitioner's wife, having been acquired by petitioner's wife with her separate property prior

to November 1, 1939. Petitioner, on his 1939 return, reported one-half (½) of this net income from royalties, or $954.82.

(c) Respondent added to petitioner's income for 1939 the $1,387.18 of income from petitioner's royalties reported by his wife on her 1939 return and excluded the same from the 1939 return of petitioner's wife, and excluded from petitioner's 1939 income the $954.82 of income from royalties owned by petitioner's wife, which was reported by petitioner on his 1939 return, and included the same in 1939 income of petitioner's wife. As a result of these adjustments, respondent added to petitioner's 1939 income $432.36.

8. Facts Particularly Relating to Assignment of Error 4 (f) (1)

(a) Petitioner, during November and December 1939, received from oil and gas leases covering premises situated in Oklahoma net taxable income of $9,722.58. All of these oil and gas leases were operated and owned by the petitioner, having been acquired by the petitioner with his separate property prior to November 1, 1939. Petitioner's wife, on her 1939 return, reported one-half (½) of this income, or $4,861.29.

(b) Petitioner's wife, during November and December 1939, received from oil and gas leases covering premises situated in Oklahoma, net taxable income of $122.70. All of these oil and
78 gas leases were operated and owned by petitioner's wife, having been acquired by petitioner's wife with her separate property prior to November 1, 1939. Petitioner, on his 1939 return, reported one-half (½) of this income, or $61.35.

(c) Respondent added to petitioner's income for 1939 the $4,861.29 of net income received from petitioner's oil and gas lease reported by his wife on her 1939 return and excluded the same from the 1939 income of petitioner's wife, and excluded from petitioner's 1939 income the $61.35 of income from oil and gas leases owned by petitioner's wife, which was reported by petitioner on his 1939 return, and included the same in the 1939 income of petitioner's wife. As a result of these adjustments, respondent added to petitioner's 1939 income $4,799.94.

9. Facts Particularly Relating to Assignment of Error 4 (f) (2)

In addition to the foregoing adjustments, respondent, in his notice of deficiency, adjusted expense and depreciation with respect to petitioner's oil and gas leases. These adjustments amount to $4,865.60, as set forth in Exhibit A attached to the deficiency notice. Petitioner concedes the correctness of these expense and depreciation adjustments and withdraws assignment of error 4 (f) (2).

10. Facts Particularly Relating to Assignment of Error 4 (h)

(a) Petitioner, during November and December 1939, paid state and local taxes in the total amount of $106.28. These taxes related to property acquired by the petitioner with his separate property prior to November 1, 1939. Petitioner's wife, on her 1939 return, deducted one-half (½) of these taxes, or $53.14.

(b) Petitioner's wife, during November and December 1939, paid state and local taxes in the total amount of $197.18. These taxes related to property acquired by the petitioner's wife with her separate property prior to November 1, 1939. Petitioner, on his 1939 return, deducted one-half (½) of these taxes, or $98.59.

(c) Respondent allowed as a deduction from petitioner's 1939 income the $53.14 of taxes deducted by his wife on her 1939
79 return and disallowed the same as in 1939 income tax deduction of petitioner's wife, and disallowed as a deduction from petitioner's income the $98.59 of taxes claimed by petitioner on his 1939 return, and allowed the same as a 1939 income tax deduction to petitioner's wife. These adjustments by respondent resulted in a net addition to petitioner's 1939 income of $45.45.

11. Facts Particularly Relating to Assignment of Error 4 (i)

(a) Petitioner, during November and December 1939, made $30.00 in charitable contributions. Petitioner's wife, on her 1939 return, deducted one half (½) of these contributions, or $15.00.

(b) Respondent allowed as an additional 1939 deduction to petitioner the $15.00 of contributions deducted by petitioner's wife on her 1939 return, and disallowed the same as a 1939 income tax deduction to petitioner's wife.

12. Facts Particularly Relating to Assignment of Error 4 (j)

(a) Petitioner, during November and December 1939, paid as expense for a field car $175.36. The field car with respect to which this expense was incurred was acquired by the petitioner with his separate property prior to November 1, 1939. Petitioner's wife, on her 1939 return, claimed as a deduction one half (½) of this amount, or $87.68.

(b) Respondent allowed as an additional deduction from petitioner's 1939 income the $87.68 of field car expense deducted by petitioner's wife on her 1939 return, and disallowed the same as a 1939 income tax deduction to petitioner's wife.

13. Facts Particularly Relating to Assignment of Error 4 (k)

(a) Petitioner, in maintaining his office during November and December 1939, paid office expenses totaling $576.74. Petitioner's wife, on her 1939 return, claimed as a deduction one half (½) of this amount, or $288.37.

(b) Respondent allowed as an additional deduction
80 from petitioner's 1939 income the $288.37 of office expenses reported by petitioner's wife on her 1939 return, and disallowed the same as a 1939 income tax deduction to petitioner's wife.

14. Facts Particularly Relating to Assignment of Error 4 (l)

(a) Petitioner, during November and December 1939, sustained depreciation of $9.32 upon office furniture and fixtures owned by him. The office furniture and fixtures with respect to which this depreciation occurred were acquired by the petitioner with his separate property prior to November 1, 1939. Petitioner's wife, on her 1939 return, claimed as a deduction one half (½) of this amount, or $4.66.

(b) Respondent allowed as an additional deduction from petitioner's 1939 income the $4.66 of depreciation claimed as a deduction by petitioner's wife on her 1939 return, and disallowed the same as a 1939 income tax deduction to petitioner's wife.

15. Facts Particularly Relating to Assignment of Error 4 (m)

(a) Petitioner, during November and December 1939, paid in traveling expenses $180.76. Petitioner's wife, on her 1939 return, claimed as a deduction one half (½) of this amount, or $90.38.

(b) Respondent allowed as an additional deduction from petitioner's 1939 income the $90.38 of traveling expenses claimed as a deduction by petitioner's wife on her 1939 return, and disallowed the same as a 1939 income tax deduction to petitioner's wife.

16. Facts Particularly Relating to Assignment of Error 4 (n)

(a) Petitioner, during November and December 1939, sustained depreciation in the amount of $177.66 upon business automobiles

These business automobiles with respect to which this depreciation occurred were acquired by the petitioner with his separate property prior to November 1, 1939. Petitioner's wife, on her 1939 return, claimed as a deduction one half ($\frac{1}{2}$) of this amount, or $88.83.

81 (b) Respondent allowed as an additional deduction from petitioner's 1939 income the $88.83 of depreciation claimed as a deduction by petitioner's wife on her 1939 return, and disallowed the same as a 1939 income tax deduction to petitioner's wife.

Harry A. Campbell,
L. K. M.,
Philtower Building, Tulsa, Oklahoma.
Hilary D. Mahin,
L. K. M.,
Philtower Building, Tulsa, Oklahoma.
Roger S. Randolph,
L. K. M.,
Philtower Building, Tulsa, Oklahoma.
L. Karlton Mosteller,
First National Building, Oklahoma City, Oklahoma,
Counsel for Petitioner.

J. P. Wenchel,
E. N. S.,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

Petitioner's Exhibit A

140322—Community Property Election

We, C. C. Harmon and Pearl M. Harmon, husband and wife, of Nowata County, State of Oklahoma, desiring to avail ourselves of the provisions of the Community Property Law, House Bill 565 of the Seventeenth Oklahoma Legislature, which Act was duly approved by the Governor of the State of Oklahoma on May 10, 1939, do hereby elect to come within the provisions of this Act as provided in Sections 1 and 2 thereof, and to have it apply to us and our property on and after the first day of November 1939, it being our understanding and agreement that this election, when filed as provided by law, shall be binding upon us until either an

absolute decree of divorce is rendered dissolving our marriage or until the death of one of us.

Dated this 26th day of October 1939.

C. C. HARMON, *Husband.*
PEARL M. HARMON, *Wife.*

STATE OF OKLAHOMA,
County of Nowata, ss:

Before me, R. O. Whitchurch, Jr., a Notary Public in and for said County and State, on this 26th day of October 1939,
82 personally appeared C. C. Harmon and Pearl M. Harmon to me known to be the identical persons who executed the within and foregoing instrument, and each acknowledged to me that they executed the same as their free and voluntary acts and deeds for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

[SEAL] R. O. WHITCHURCH, JR., *Notary Public.*

My Commission Expires 9-10-40.

Filed for record Oct. 26, 1939, at 1:20 o'clock P. M.

C. L. WOODS, *County Clerk.*
By MARGARET MILLS, *Deputy.*

STATE OF OKLAHOMA,
County of Nowata, ss:

I, C. L. Woods, County Clerk of Nowata County, Oklahoma, do hereby certify the within to be a true and correct copy of an instrument of writing filed for record at Nowata, Nowata County, Oklahoma, on the 26th. day of Oct. 1939 at 1:20 o'clock P. M. and was duly recorded in Book 274 at Page 120 of the records of this office.

Witness my hand and official seal this 31st day of Jan. 1942.

C. L. WOODS, *County Clerk,*
[SEAL] By BERNACE MCCAIN, *Deputy.*

Petitioner's Exhibit B

State of Oklahoma

[Seal]

Office of Secretary of State

To All to Whom These Presents Shall Come, Greeting:

I, C. C. Childers, Secretary of State, of the State of Oklahoma, do hereby certify that the following and hereto attached is

83 a true copy of Community Property Election Between C. C. Harmon and Pearl M. Harmon, Nowata County, State of Oklahoma. Filed Oct. 27, 1939, the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of State. Done at the City of Oklahoma City, this Nineteenth day of February, A. D. 1942.

[Seal] C. C. CHILDERS, *Secretary of State.*

Community Property Election

We, C. C. Harmon and Pearl M. Harmon, husband and wife of Nowata County, State of Oklahoma, desiring to avail ourselves of the provisions of the Community Property Law, House Bill 565 of the Seventeenth Oklahoma Legislature, which Act was duly approved by the Governor of the State of Oklahoma on May 10, 1939, do hereby elect to come within the provisions of this Act as provided in Sections 1 and 2 thereof, and to have it apply to us and our property on and after the first day of November 1939, it being our understanding and agreement that this election, when filed as provided by law, shall be binding upon us until either an absolute decree of divorce is rendered dissolving our marriage or until the death of one of us.

Dated this 26th day of October 1939.

C. C. HARMON, *Husband.*
PEARL M. HARMON, *Wife.*

STATE OF OKLAHOMA,
County of Nowata, ss:

Before me, R. O. Whitchurch, Jr., a Notary Public in and for said County and State, on this 26th day of October 1939, personally appeared C. C. Harmon and Pearl M. Harmon, to me known to be the identical persons who executed the within and foregoing instrument, and each acknowledged to me that they executed
84 the same as their free and voluntary acts and deeds for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

[SEAL] R. O. WHITCHURCH, JR., *Notary Public.*
My Commission Expires 9-10-40.

A-373

COMMUNITY PROPERTY ELECTION BETWEEN C. C. HARMON, HUSBAND, AND PEARL M. HARMON, WIFE.

State of Oklahoma

This instrument was filed for record on the 27 day of Oct. 1939, at 3 o'clock P. M., and duly recorded in book 1, page 251, of the records of this office.

C. C. CHILDERS, *Secretary of State.*
K. MANTON,
CAMPBELL & RANDOLPH,
$1.00. *Tax Attorneys, Tulsa, Okla.*

In the Tax Court of the United States

Petition for review

Filed April 9, 1943

Guy T. Helvering, Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Tenth Circuit to review the decision entered by The Tax Court of the United States (formerly United States Board of Tax Appeals) on January 26, 1943, ordering and deciding that there is an overpayment in income tax for the taxable year 1939 in the amount of $9,020.74, which amount was paid within three years before the filing of the petition (Section 322 (d), Revenue Act of 1938). This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the United States Internal Revenue Code.

85 C. C. Harmon, respondent on review, filed his Federal income tax return for the taxable year 1939 with the Collector of Internal Revenue for the District of Oklahoma, located at Oklahoma City, Oklahoma, which collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Tenth Circuit, wherein this review is sought.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. P. WENCHEL.
R. L. W.,
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner on Review.

4/19/43.
Of Counsel:
CLAUDE R. MARSHALL,
Special Attorney, Bureau of Internal Revenue.

In the Tax Court of the United States

Notice of filing petition for review

Filed April 16, 1943

To HARRY A. CAMPBELL, Esq., *Philtower Building, Tulsa, Oklahoma:*

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of April 1943, file with the Clerk of The Tax Court of the United States (formerly United States Board of Tax Appeals), at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this — day of April 1943.

B. D. GAMBLE,
Clerk, The Tax Court of the United States.

Service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 13th day of April 1943.

HARRY A. CAMPBELL,
Attorney for Respondent on Review.

CRM cal.
4 1943.

86 In the Tax Court of the United States

Notice of filing petition for review

Filed April 20, 1943

To C. C. HARMON, *Nowata, Oklahoma:*

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of April 1943, file with the Clerk of The Tax Court of the United States (formerly United States Board of Tax Appeals), at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit, of the decision of the Tax Court heretofore rendered in the above-

entitled case. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 9th day of April 1943.

J. P. WENCHEL,
R. L. W.,
Chief Counsel, Bureau of Internal Revenue,
Attorney for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 14th day of April 1943.

C. C. HARMON,
Respondent on Review.

CRM cal.
4 43.

In the Tax Court of the United States

Statement of points to be relied upon

Filed April 13, 1943

Now comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review in the above-entitled cause, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

That The Tax Court of the United States (formerly United States Board of Tax Appeals) erred:

1. In holding and deciding that the Oklahoma Community
87 Property Law (Title 32, Oklahoma Statutes Annotated, Sections 51–65, effective July 29, 1939) passed by legislative enactment is effective to permit the equal division of so-called community income and deductions, for Federal income tax purposes, between husband and wife who have elected to come under the terms of the law.

2. In failing to hold and decide that the Oklahoma Community Property Law (Title 32, Oklahoma Statutes Annotated, Sections 51–65, effective July 29, 1939) passed by legislative enactment is not effective to permit the equal division of so-called community income and deductions, for Federal income tax purposes, between husband and wife who have elected to come under the terms of the law.

3. In holding and deciding that income of the taxpayer and his wife, residents of the State of Oklahoma during 1939, designated community income under the provisions of the Oklahoma Com-

munity Property Law of 1939, may be reported, for Federal income tax purposes, in equal shares by the taxpayer and his wife in their separate returns.

4. In failing to hold and decide that income of the taxpayer and his wife, residents of the State of Oklahoma, designated community income under the provisions of the Oklahoma Community Property Law of 1939, may not be reported, for Federal income tax purposes, in equal shares by the taxpayer and his wife in their separate returns.

5. In holding and deciding that the Oklahoma Community Property Law, once properly invoked by expressed voluntary election by husband and wife, residents in that State, created in each of the spouses a vested estate in one-half of the alleged community property which must be given recognition for Federal income tax purposes.

6. In failing to hold and decide that the Oklahoma Community Property Law, after expressed voluntary election by husband and wife, residents in that State, to avail themselves of its provisions, did not create in each of the spouses so electing such a vested
88 estate in one-half of the alleged community property which need be given recognition for Federal income tax purposes.

7. In failing to hold and decide that the statutory election which taxpayer and his wife made to avail themselves of the Oklahoma Community Property Law was an "anticipatory agreement" and ineffective to shift the Federal income tax liability on the taxpayer's earnings and profits to his wife.

8. In failing to hold and decide that the taxpayer cannot shift his Federal income tax liability upon his wife by merely making an expressed voluntary agreement with her under the provisions of the Oklahoma Community Property Law of 1939.

9. In holding and deciding that taxpayer and his wife, having made a statutory election to come under the Community Property Law of the State of Oklahoma as of November 1, 1939, are entitled to report separately for Federal income tax purposes their respective share of alleged community income and deductions pertaining thereto for the period January 1, to December 31, 1939.

10. In failing to hold and decide that taxpayer and his wife, having merely made a statutory election to come under the Community Property Law of the State of Oklahoma as of November 1, 1939, are not entitled to report separately for Federal income tax purposes their respective share of alleged community income and deductions pertaining thereto for the period January 1, to December 31, 1939.

11. In that its opinion and decision are contrary to the law and the regulations, and are not supported by substantial evidence of record.

12. In ordering and deciding that there is an overpayment in income tax for the calendar year 1939 in the amount of $9,020.74, which amount was paid within three years before the filing of the petition (Section 322 (d), Revenue Act of 1938).

89 13. In failing to order and decide that there is a deficiency in income tax for the calendar year 1939 in the amount of $11,029.95.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within Statement of Points to be relied on is hereby admitted this ______ day of ______________, 1943.

____
Attorney for Respondent on Review.

CRM/cal.
5/1943

In the Tax Court of the United States

Designation of portions of record, proceedings, and evidence to be contained in record on review

Filed April 13, 1943

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Tenth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings.
2. Pleadings: (a) Petition and copy of deficiency notice, together with statement attached thereto. (b) Amended petition and copy of deficiency notice, together with statement attached thereto. (c) Answer to amended petition.
3. Opinion promulgated November 18, 1942.
4. Decision of Tax Court entered January 26, 1943.
5. Stipulation of Facts relating to assignments of error 4 (a), (b), (c), (d), (e), (f) (1), (f) (2), (h), (i), (j), (k), (l), (m), (n) and exhibits attached.

90 6. Petition for review filed by the Commissioner of Internal Revenue, together with proof of service of notice of

filing petition for review and of service of a copy or petition for review.

7. Statement of Points to be relied upon.

8. Any and all orders of enlargement of time for the preparation of the evidence and for the transmission and delivery of the record. **Not of record.*

9. This Designation.

Said transcript to be prepared and certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Tenth Circuit.

J. P. WENCHEL,
R. L. W.
Chief Counsel, Bureau of Internal Revenue,
Attorney for Petitioner on Review.

In the Tax Court of the United States

Notice of filing designation of portions of record, proceedings, and evidence to be contained in record on review and statement of points

Filed April 23, 1943

To HARRY A. CAMPBELL, Esq., *Philtower Building, Tulsa, Oklahoma.*

Please take notice that the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, has filed with Clerk of The Tax Court of the United States, at Washington, D. C., on this date his Designation of Portions of Record, Proceedings and Evidence to be contained in Record on Review and
91 Statement of Points herein, copies of which Designation and Statement of Points are delivered to you herewith.

Dated this 13th day of April, 1943.

J. P. WENCHEL,
R. L. W.,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Petitioner on Review.

Receipt of a copy of each of the above described documents, Designation and Statement of Points, is hereby acknowledged this 17th day of April, 1943.

CRM cal.
1943.

HARRY A. CAMPBELL,
Counsel for Respondent on Review.

*Words in italics in pencil on typewritten copy.

IN THE TAX COURT OF THE UNITED STATES

Designation of portions of record, proceedings, and evidence to be contained in record on review

Filed April 26, 1943

To the Clerk of The Tax Court of the United States:

In addition to the documents and records which the petitioner on review has requested you to prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit on behalf of respondent, it is requested that you also prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit copies duly certified as correct of the following documents and records:

1. Numbered paragraphs 1 and 2 of the Stipulation of Facts containing paragraphs 1 to 16, both inclusive, and Petitioner's Exhibits A and B, referred to in such paragraphs and attached to such Stipulation;
2. This designation.

The said copies to be included in the transcript to be prepared, certified, and transmitted by you, as required by law
92 and the rules of the United States Circuit Court of Appeals for the Tenth Circuit.

HARRY A. CAMPBELL,
L. K. M.,
Philtower Building, Tulsa, Oklahoma,
ROGER S. RANDOLPH,
Philtower Building, Tulsa, Oklahoma,
HILARY D. MAHIN,
L. K. M.,
Philtower Building, Tulsa, Oklahoma,
L. KARLTON MOSTELLER,
First National Building,
Oklahoma City, Oklahoma;
Counsel for Respondent on Review.

Counsel for petitioner on review hereby admits service of copy of the foregoing designation, and hereby agrees to the same this 26th day of April, 1943.

J. P. WENCHEL,
Attorney for Petitioner on Review.

[Clerk's certificate to foregoing transcript omitted in printing.]

93 In the United States Circuit Court of Appeals for the Tenth Circuit

Order of Submission

Sept. 10, 1943

This cause came on to be heard and was argued by counsel, Samuel O. Clark, Jr., Esquire, appearing for petitioner, L. Karlton Mosteller, Esquire, appearing for respondent.

Thereupon this cause was submitted to the court with the understanding and agreement of counsel that in the event the judges disagree they may call in a third judge to examine the record and briefs and participate in the decision of the case.

94 In United States Circuit Court of Appeals

Order re participation of Symes, D. J., in consideration of, and decision in, cause

Dec. 2, 1943

This cause heretofore came on for argument and was submitted to the court, consisting of Honorable Orie L. Phillips and Honorable Walter A. Huxman, Circuit Judges, with the understanding and agreement of counsel that a third judge could be called in to examine the records and briefs and participate in the decision of the case, and it appearing to the court that the issues involved are of such a nature that it is desirable that a third judge be called in to participate in this cause.

It is now here ordered that Honorable J. Foster Symes, United States District Judge for the District of Colorado, heretofore assigned to assist in holding circuit court for the September Term, 1943, be and he is hereby called in to consider and participate in the decision in this cause.

95 In United States Circuit Court of Appeals

Samuel O. Clark, Jr., Assistant Attorney General, (Sewall Key, Helen R. Carloss, and William A. Clineburg, Special Assistants to the Attorney General, were with him on the brief) for petitioner.

L. Karlton Mosteller (Campbell, Randolph, Mosteller and McElroy, were with him on the brief) for respondent.

Before Phillips and Huxman, Circuit Judges, and Symes, District Judge.

Opinion

December 2, 1943

SYMES, District Judge, delivered the opinion of the Court.

This is an appeal from a decision of the Tax Court of the United States entered January 26, 1943, involving the Federal income tax liability of the respondent Harmon for the taxable year 1939, pursuant to § § 1141 and 1142 of the Internal Revenue Code.

The question presented is; the respondent and his wife were domiciled in Oklahoma during all of the taxable year 1939.
96 In that year they duly elected to have the Oklahoma Community Property Act irrevocably applied to them and their property beginning November 1, 1939, and thereafter. During the period commencing November 1, 1939, and ending with December 31, 1939, the respondent and his wife received certain sums of community income consisting of earnings of the respondent, income from the separate property of the respondent, and income from the separate property of the respondent's wife. It is admitted that all of these items of income and earnings constituted community income under the Oklahoma Community Property Act.

Oklahoma, by legislative enactment effective July 29, 1939, adopted a community property law similar in some respects to that of Texas and other community property law states. Oklahoma Stats. Ann., Tit. 32 § § 51-55. This law becomes operative in any particular case only when an election to come under the law is made by any husband and wife. This provision—not found in any other of the traditional community property acts of other states—is as follows:

"SEC. 52. Election to come under act, form of—Filing.—The written election to come under the terms of this Act, referred to in Section 1 of this Act, shall be a written instrument signed and acknowledged in duplicate by both husband and wife, stating in substance that they desire to avail themselves of the Act and have same apply to them and to their property on the first day of the next month in any year subsequent to the filing thereof in both the office of the county clerk and the Secretary of State as hereinafter provided. Acknowledgements shall be in the form, and may be taken before any officer now prescribed by law for acknowledgements to conveyances of real estate. One of the said written instruments shall be filed in the office of the county clerk of the county of the residence of the signers thereof, and one in the office of the Secretary of State. The county clerks and the Secretary of State shall cause all such instruments to be recorded in records kept for that purpose, and to be properly indexed."

97 On October 26, 1939 a duly executed election properly executed by the respondent and his wife was filed for record with the county clerk of Nowata County, Oklahoma, and in the office of the Secretary of State on October 27, 1939. By reason thereof the Oklahoma Act applied to respondents and their property on and after November 1, 1939. The taxpayer and his wife filed separate income tax returns for 1939, in which each reported one-half of the amount of income received and deductions taken for the period November 1, 1939 to December 31, 1939.

The Commissioner assessed a deficiency against the taxpayer of $11,029.95. In his determination of the deficiency he denied the taxpayer and his wife the right to divide the community income and the deductions claimed. The Tax Court, however, sustained the taxpayer's right to split the community income and deductions with his wife for Federal income tax purposes, and determined an overpayment of $9,020.74. The taxpayer paid the deficiency and filed a claim for refund after the petition for review was filed.

The points relied upon by the petitioner are set forth on pages 86-89 of the record, and may be briefly summarized as follows: That the Tax Court erred in holding and deciding the Oklahoma Community Property Law is effective to permit the equal division of so-called community income and deductions for Federal income tax purposes between husband and wife, who have elected to come under the terms of the law. In failing to hold and decide that the Oklahoma Community Property Law is not effective to permit the equal division of so-called community income and deductions for Federal income tax purposes between husband and wife who have elected to come under the terms of the law. And in holding and deciding the Oklahoma Community Property Law, once properly invoked by expressed voluntary election by husband and wife residents in that state, created in each of the spouses a vested estate in one-half of the alleged community property which must be given recognition for Federal income tax purposes.

The Commissioner further argues the Federal income tax
98 law should operate uniformly throughout the states and impose a like burden on married persons domiciled in all states and that tax advantages such as the one in question should not be given to married persons domiciled in a particular group of states, unless no other construction than the one permitting the advantages can be placed on the language of the particular statute in question. That spouses of eight community property states possess such advantages, but those particular statutes were in effect at the time of the adoption of the Sixteenth Amendment. That the situation in Oklahoma is different, the statute having been enacted for the purpose of enabling the citizens of that state to enjoy the tax advantages of the traditional community property states.

That the election made gives the earnings of the taxpayer and his wife the label of community property, that this label has no magic qualities and the question whether these entire amounts are taxable to the husband, or taxable one-half to him and one-half to his wife depends upon the respective rights, powers and privileges of the taxpayer and his wife with respect to the amounts. That the Act has failed to achieve its purpose and the taxpayer is taxable on the whole of his earnings and the income from his separate property, because the election necessary to come under the Act constitutes an agreement between the two spouses to divide their earnings and the income from the separate property of one of them. That the Supreme Court has held that such agreements are ineffective to divide the husband's earnings between the husband and wife for purposes of Federal income taxation. Citing Lucas v. Earl, 281 U. S. 111—the principle of which case he says is applicable here.

True, the election privileges necessary to establish a community status under the Oklahoma Act distinguishes this Act from the situation in traditional community property states. In other states the community status is not dependent upon an election or private agreement, but arises automatically by action of law when residents of those states marry, or when married persons become domiciled in those states.

99 This question has been before the Supreme Court in a series of cases in which the Court construed the community property statutes of different states. A correct application of those decisions to the situation here presented is all that is necessary to a decision.

The case relied upon by petitioner—Lucas v. Earl (supra)—arose in California and did not involve or require the construction of the community property law of that state. Earl and his wife agreed by private contract between them that any property

> "either of us now has or may hereafter acquire in any way * * * shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants, and not otherwise, with the right of survivorship."

The validity of this agreement was not questioned under the laws of California where the parties lived.

The argument made there was that the basic principle of the income tax law is that it is a tax on income beneficially received and that under this principle the income under this agreement must be taxed as the joint income of the respondent and his wife. That if there was at the moment of receipt of the property an instant of time when the husband held it exclusively as his own, he held it only as a naked trustee and therefore it was taxable as income of the beneficiary. The Court, however, held the Revenue

Act in question imposed a tax upon the net income of every individual, including

"income derived from salaries, wages or compensation for personal service * * * of whatever kind and in whatever form paid."

That the case turned upon the import and reasonable construction of the taxing act, and the statute could tax salaries to those who earned them and provided the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised
100 to prevent the salary when paid from vesting even for a second in the man who earned it. That that was the import of the statute before the Court and the income described in the Act was taxable to the husband.

This case was later distinguished by the Supreme Court in Poe v. Seaborn, 282 U. S. 101. The Court in discussing the Earl case said (p. 117):

"That case presents quite a different question from this, because here, by law, the earnings are never the property of the husband, but that of the community."

Poe v. Seaborn involved the community property law of the State of Washington. The Court held the wife had in Washington a vested property right equal to that of the husband in community property, and although the husband had broad power of control with limited accountability to the wife this power is conferred on him as agent of the community and does not make him owner of the community property and income, nor negative the wife's present interest therein as a co-owner saying, p. 111:

"Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal to that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both."

And squarely held that the husband and wife were entitled to file separate returns, each treating one-half of the community income as their separate property.

The Court conceded the answer to the question involved in the cause was found in the statutes of the particular state and the decisions interpreting them as to a wife's ownership of or interest in community property, pointing out that under the statutes of Washington the husband had the management and control of community personal property, and like power of disposition thereof as of his separate property, and that this power is subject to
101 restrictions inconsistent with a denial of the wife's interest as co-owner. That the wife may borrow for community purposes and bind the community property and the husband may

not discharge his separate obligations out of community property. The wife may, suing alone, enjoin collection of his separate debt out of the community property. Further the wife may prevent him from making substantial gifts out of the community property without her consent, and the community property is not liable for the husband's torts not committed in carrying out the business of the community.

In replying to the argument that the husband had the power of conveyance, to make contracts, and to do anything with it short of committing a fraud on the wife, the Court says, citing Warburton v. White, 176 U. S. 484, at p. 494, holding that where the Washington statute gives the husband the entire management and control and sale of the community property, such a right is vested in him, not because he was the exclusive owner but because by law he was created agent of the community. The proceeds of the property when sold by him become an acquet of the community and not the sole property of the one in whose name the property was bought. That from the very nature of the property relation engendered by the provision for the community trust a trust was imposed on the husband.

Under the Oklahoma statute both the wife and the husband have management, control and disposition of a portion of the community property, but as the decisions point out this power is exercised by the spouses respectively not as owner but agents of the community created by law. It is also true that under the Oklahoma law that part of the community property record title to which is under the husband's name or under his managment control and disposition, is subject to his debts. That is likewise true under the Texas statute. See Texas Rev. Stats. Ann., Vernon Civil Code, §§ 4620–4621. The same is likewise true by implication under the California statute. See California Civil Code, Deering, 1941, §§ 167, 168, 172, 172a. Likewise, under Lou-
102 isiana statutes (La. Civ. Code Ann.), Dart, 1932, Art. 2403 (2372) (M 14–9–29), and the Arizona statute (Arizona Code Ann. 1939, §§ 63–304 and 63–305).

The Court in the Poe case points out that grounds of public policy justify the conferring of sweeping powers of management on the husband, but that (p. 113):

"* * * under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife."

The case rejects as authority U. S. v. Robbins, 269 U. S. 315, in which the Court held under the law of California as it then existed and construed by the state court the wife had a mere expectancy and the property rights of the husband were so complete he was

in fact owner and the income from community property was taxable to him. Later in U. S. v. Malcolm, 282 U. S. 792, the Court held that because of certain amendments to the California statute since the Robbins case and on the authority of the Poe case (supra), the wife had such an interest in the community income that she should separately report and pay the tax on one-half thereof.

Sec. 56 of the Oklahoma Act provides that all property acquired by the husband or wife after the date of the election—except the separate property of either one or the other—shall be community property

"and each subject to the provisions of this Act shall be vested with an undivided one-half interest therein."

This we think brings our case squarely within Poe v. Seaborn (supra).

In Harmon v. the Oklahoma Tax Commission, 189 Okla. 475 (118 Pac. (2d) 205), the Oklahoma court held the Oklahoma Act valid and income derived by the husband from the sale of oil and gas from producing leases owned and operated by him after the effective date of his election to come under the terms of the Com-
munity Property Act is community or common property of
103 the husband and his wife, and should be so treated in esti-
mating amount of income taxes due the state.

The fact that the Oklahoma statute is elective does not differentiate it from other community property statutes. Once the election is made it is irrevocable, and thereafter one-half of the property and the income therefrom vests in each spouse. We see no difference in legal effect between the statute under which the husband and the wife may elect to have the act apply to their property rights in the future, and a statute which operates unless expressly revoked by the contract of the spouses. The community statutes which fall into the latter category are California (see Helvering v. Hickman (CCA 9th), 70 Fed. (2d) 985, and Sparkman v. Commissioner (CCA 9th), 112 Fed. (2d) 774); Arizona (see Martha Locke Shoneir v. Commissioner, 45 B. T. A. 576); and Washington (see § 10572, Wash. Rev. Stat. Ann. Remington 1931).

Poe v. Seaborn (supra), was one of a group of cases arising under community property laws of various states decided at the same time. United States v. Robbins, 269 U. S. 315 (1926), (California); Goodell v. Koch, 282 U. S. 118, (1930), (Arizona); Bender v. Pfaff, 282 U. S. 127 (1930), (Louisiana); and Hopkins v. Bacon, 282 U. S. 122 (1930), (Texas). In Hopkins v. Bacon (supra), the Court said, p. 125:

"In view of our decision in Poe v. Seaborn, the only matter to be examined here is whether under the community property system of Texas the wife has a mere expectancy, as she would under the

law of California (cf. United States v. Robbins, 269 U. S. 315), or on the contrary has a proprietary vested interest in the community property such as makes her an owner of one-half of the community income."

And held that under the Laws of Texas the wife had a present vested interest in such property equal to that of her husband and she and her husband were entitled to make separate returns.

104 As further ground for reversal the Commissioner urges that the purpose of the enactment of the Oklahoma statute was to give residents of that state Federal income tax advantages over citizens of other states and prevent the flow of capital from Oklahoma to adjoining community property states. On this record we are concerned only with the legal rights created by the statute and the consequences flowing therefrom and cannot inquire into the motives actuating the legislature. State v. Rat Portage Lumber Co., 115 N. W. 163 (Minn.):

"When the legislature has the power to enact a given law * * * it is the duty of the courts to construe that act so as to effectuate it." Ellis v. Boer, 114 N. W. 239 (Mich.):

"It is not the province of the court to inquire why the Legislature struck such a provision out of the law. It is the province of the court to construe the legislative enactment."

Furthermore the Poe case (supra), p. 114, points out that the Treasury twice suggested to Congress an amendment to the Revenue Laws which would impose on the husband the tax on the whole community income. The Congress, however, has not seen fit to adopt the suggestion.

In conclusion let it be said, as stated in Bender v. Pfaff (supra), at p. 132, that as long as the wife under the Oklahoma statute has a present vested interest in community property equal to that of her husband, the spouses are entitled to file separate returns, each treating one-half of the community income as income of each "of" them as an individual, as those words are used in the Revenue Act.

The decision of the Tax Court of the United States is affirmed.

105 *Dissenting opinion*

HUXMAN, Circuit Judge, Dissenting:

I agree that this case is controlled by the decision of the United States Supreme Court in Poe v. Seaborn, 282 U. S. 102. The Poe case passed upon the community property law of the State of Washington. Throughout that opinion the court stressed the fact that the law of Washington gives the wife a present vested interest in the community property and income which cannot be disregarded, and which, if necessary, she can protect in a separate action in court. The court pointed out that the husband may not

discharge his separate debts out of the community property, that the wife may sue alone to enjoin collection of his separate debts out of the community property, and that she may prevent his making substantial gifts out of the community property without her consent. The court stated specifically that the wife has a vested property right in the community property and the income equal to that of the husband. The court pointed out that the husband's right of management and operation of the community estate is that of an agent of the community estate and that the broad powers vested in the husband do not negative the wife's present interest in the community estate.

32 O. S. A. § 56, clearly creates a community estate within the decision of the Poe case as to the property covered by the section. It specifically provides that the wife shall have an undivided one-half interest in the community estate. From Section 56 alone, I would have no difficulty in concluding that a husband and wife who had elected to come under the provisions of the act would each have the right to file separate income tax returns and each return one-half of the total community income.

But the Act must be read in its entirety, and whether a community estate is created can be determined only by a consideration of all the provisions of the Act. Section 57 provides:

"That portion of the community property, record
106 title to which is in her name or which is under the management, control and disposition of the wife, shall be subject to debts contracted by the wife arising out of tort or otherwise, but not to debts or liabilities of the husband."

And, again:

"That portion of the community property, record title to which is in his name or which is under the management, control and disposition of the husband shall be subject to debts contracted by the husband or liabilities of the husband arising out of tort or otherwise, but not the debts or liabilities of the wife."

From this, it follows that if the community estate stands in the name of the husband or is entirely under his control, it is all subject to his personal debts and obligations and may be consumed entirely, if necessary, in payment of such debts. Where, then, is that protection of the wife's one-half interest in the community estate which the Supreme Court stresses so in the Poe case? It simply does not exist. Under section 57 the community estate may be wiped out completely in satisfaction of the separate debts of the husband.

No provision comparable to Section 57 can be found in the community property statutes of any of the traditional community property states.

It stands admitted that the purpose of the passage of the law was to make available to citizens of Oklahoma the benefits of the community property law for income tax purposes. This Oklahoma had the right to do. But it could not pass a community property law in form and yet for all practical purposes leave the estate or property and right of management, control or enjoyment the same as before the passage of the law. It is my conclusion that the law in question fails to create a genuine community property estate recognizable for income tax purposes within the decisions of the United States Supreme Court. The
107 hands may be the hands of Esau, but the voice is still the voice of Jacob.

I think the decision of the Tax Court should be reversed.

108 In United States Circuit Court of Appeals

Judgment

Dec. 2, 1943

This cause came on to be heard on the transcript of the record from The Tax Court of the United States and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said The Tax Court of the United States in this cause be and the same is hereby affirmed.

On January 6, 1944, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to The Tax Court of the United States.

109 [Clerk's Certificate to foregoing transcript omitted in printing.]

110 Supreme Court of the United States

Order allowing certiorari

(Filed April 3, 1944)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 48234. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 741. Commissioner of Internal Revenue, petitioner vs. C. C. Harmon. Petition for a writ of certiorari and exhibit thereto. Filed February 28, 1944. Term No. 741 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1944